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THE MICHIGAN LAW

OF

MECHANICS' LIENS

INCLUDING

LAW RELATING TO PUBLIC WORKS

LAW—ANNOTATED STATUTES
PRACTICE—FORMS

By
ROGER I. WYKES
GRAND RAPIDS BAR

1918
DETROIT
FRED S. DRAKE

TX
W68

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By Roger L. Wykes

June 25, 1924

JUN 25 1924

PREFACE

The appearance of this work is accompanied with no apology. I believe it will fill a need of the profession and have endeavored, with the assistance of MR. L. DE CAMP AVERILL of the Grand Rapids Bar, to make it both accurate and exhaustive of the Michigan law upon the subject. How far we have succeeded must be left to the profession to judge. If the work meets approval, we shall owe it chiefly to the importance of the subject and the need for a comprehensive treatment of the Michigan law concerning it, and if it in any way assists the profession, we shall feel amply repaid for the labor involved.

ROGER I. WYKES.

Grand Rapids, Michigan,
June 1, 1918.

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Part I—Commentaries

CHAPTER I.

LIEN LAWS IN GENERAL.*

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2. Historical Review of the Michigan Law.
3. Constitutionality of the Michigan Lien Statute.
4. Principles and Rules Surrounding the Construction of the Michigan Lien Statute.
5. Statutory Construction of Certain Terms.
6. Operation as Being Prospective or Retrospective.

§ 1. Origin, Purpose, Nature and Effect.

Mechanics' lien laws are remedial in nature, in derogation of the common law, and find their origin solely in statutes.[1] The liens given do not grow out of, though they depend upon, contract; they do not abrogate any of the common law remedies, and no vested right in the remedies of a

*In the general as to the subjects comprehended in Chapt. I, see Title "Mechanics' Liens," 34 Cent. Dig. §§ 1-11, and 13 Dec. Dig. §§ 1-11.

1. Hanes & Co. v. Wadey, 73 Mich. 178, 41 N. W. 222; Wildey v. Gillett, 171 Mich. 153 (158), 136 N. W. 1116; Zilz v. Wilcox, 190 Mich. 486, 23 D. L. N. 24 (27), 157 N. W. 77; Burman v. Ewald, 192 Mich. 293, 23 D. L. N. 449, 158 N. W. 853; Smalley v. Terra Cotta Co., 113 Mich. 141 (145, 148), 71 N. W. 466; Hall v. Erkfitz, 125 Mich. 332 (335), 84 N. W. 310; Sterner v. Haas, 108 Mich. 488 (489), 66 N. W. 348; Wagar v. Briscoe, 38 Mich. 592; Willard v. Magoon, 30 Mich. 273 (275-276); Bauer v. Long, 147 Mich. 351 (353), 110 N. W. 1059; Peninsular Electric Co. v. Norris, 100 Mich. 496 (502), 59 N. W. 151; Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 128 (136), 12 S. Ct. 181, 35 L. Ed. 961; Wilkinson on Mechanics' Liens, pp. 1-2; 27 Cyc. 17.

Mechanics' lien laws designed to attain the same ends as, but each with provisions varying in greater or less degree from, the Michigan statute exist in practically all of the states. These are epitomized and annotated in Jones on Liens, 3rd Ed. §§1186 to 1233, both inclusive. Houck on Law of Liens, §§13, 44.

particular statute arises.[2] The purpose of such laws is to grant the right to lien to every person who performs any work or service, or furnishes any material of value in furtherance of the contract, and to create a preference or priority in property constructed, improved, altered, repaired or ornamented by the service, labor or material furnished or performed by those entitled to lien, thus affording the furnisher or performer a needed protection.[3] The doctrine upon which such liens are founded is the consideration of natural justice, that the party who has enhanced the value of property by incorporating therein his labor or material, shall have a preferred claim, in a certain sense on such prop-

2. The lien given by statute is no part of the contract. Without the statute creating the lien, the debtor was bound to pay the creditor the same as he would be with the lien. He had before this the common-law remedies to enforce the collection of his debt. The statute giving him a lien does not take away any remedy under the common law, but adds another, by fixing a lien upon the premises in case he sees fit to enforce it. This lien does not grow out of the contract, but depends entirely upon the statute for its existence. It derives its validity from positive enactment of the Legislature, and is liable always to be modified, altered, or repealed by the same power that created it. If it is true, one may contract to furnish the materials in view of the law as it exists at the time, but he furnishes the same, nevertheless, with notice that the law is subject to the will and control of the Legislature. The lien is but a means for enforcing the payment of the debt arising from the performance of the contract,—a remedy given by law, which remedy, not being of the essence of the contract, is entirely within the control of the law-making power by whose authority it was given life. The right to a particular remedy is not a vested right. Hanes & Co. v. Wadey, 73 Mich. 181, 41 N. W. 222.

3. Frohlich v. Klein, 160 Mich. 147, 125 N. W. 14; Scales v. Griffin, 2 Doug. 54 (58); Smalley v. Gearing, 121 Mich. 190 (198, 203), 79 N. 1114, 80 N. W. 797. It is the use of the materials furnished and labor expended by the contractor, whereby the building becomes a part of the freehold that gives the material man or laborer his lien under the statute. The object is not only to encourage building, but to afford the contractor, material man, or laborer security upon and against the property of the owner materially increased in value by the materials and labor wrought into it, and so rests upon the strongest equitable basis, for the building becomes a part of the realty, and it is the principal matter, to which the lien on the realty seems to be an incident, and without which the lien on the building would be fruitless or of little value. Goodman v. Baerlocher, 88 Wis. 287 (292), 60 N. W. 415. 43 Am. St. Rep. 893 (quoting Van Stone v. Stillwell, etc., Mfg. Co., 142 U. S. 128, (136), 12 S. Ct. 181, 35 L. Ed. 961); 27 Cyc. 17.

erty for the value of such labor or material.[4] Such laws have a salutary effect in encouraging building and in protecting those furnishing labor and material, and at the same time affording the safe extension of credit to those erecting new structures or improving or enhancing the value of existing structures or premises. They rest on broad grounds of natural equity and commercial necessity.[5] The effect of the lien law, where it is applicable, is to create a species of statute mortgage, whether the contract is written or unwritten, even though the land-holder may not have intended in point of fact to charge his estate.[6]

§ 2. Historical Review of the Michigan Law.

The first mechanics' lien law of Michigan was adopted by the Legislative Council of the territory of Michigan and approved March 31, 1827.[7] It consisted of but one section the provisions of which were applicable only "within the city of Detroit or county of Brown," in the Territory, but by a later act of the same Council, approved October 29, 1829, the provisions of the law were extended to the several counties of the Territory.[8] On April 23, 1833, this act was repealed and a new act applying to the entire territory and consisting of three sections was approved.[9] In 1838, when

4. The statute was intended to protect subcontractors, material men, and laborers, and its benefits should not be frittered away by construction, unless clearly unconstitutional. It does not impair the obligations of contracts, but provides a method for securing payment to those whose labor or material goes into the building, and at the same time protects the owner and contractor, if the provisions of the act are complied with. The doctrine upon which such liens are founded is the consideration of natural justice that the party who has enhanced the value of property by incorporating therein his labor or materials shall have a preferred claim, in a certain sense, on such property, for the value of his labor or materials, Smalley v. Gearing, 121 Mich. 198 (203), 79 N. W. 1114, 80 N. W. 797, Scales v. Griffin, 2 Doug. 54 (59).

5. 27 Cyc. 17.

6. Hammond v. Wells, 45 Mich. 11, (13), 7 N. W. 218; see also Kirkwood v. Hoxie, 95 Mich. 62 (65), 54 N. W. 720; Willard v. Magoon, 30 Mich. 273 (276). See §83.

7. II Territorial laws, p. 331; Wilkinson on Mechanics' Liens, pp. 3-6.

8. II Territorial Laws, p. 727.

9. III Territorial Laws, p. 1189.

the first Revised Statutes of the state appeared, the act of 1833 was repealed[10] and an act comprising thirty-five sections was adopted;[11] sections one and four of this act were amended in 1840 by Act 35, but the act as amended was repealed on May 18, 1846[12] and a new statute of thirty-four sections was enacted.[13] This statute with a few amendments[14] stood until 1879, when it was superseded by Act 258 of 1879[15] amending sections 1 to 6 inclusive, and 10 to 24 inclusive, and repealing sections 7 to 9 and 25 to 34 and also repealing Act 182 of the Laws of 1871, composed of eight sections.[16] The act of 1879 was amended in section 6 by Act 102 of 1885 and again in sections 1 to 5 by Act 216 of 1885, but was, with all amendatory acts, repealed by Act 270 of 1887, which was a revision of the lien law of the state in fourteen sections. Section 1 of the act of 1887 was amended in Act 277 of 1889 in some unimportant details, and the act as then amended appeared in III Howell's Annotated Statutes (1883-1889) as Sections 8398a to 8398n. As the new matter incorporated in the statute of 1887 constituted "a gross perversion of all the essential rights of property," it was declared to be unconstitutional,[17] thus leaving the lien law of the state "where it was before the law (act) of 1887 was passed." In 1891, the acts of 1879 and 1887 were repealed, the entire statute being revised and re-enacted in thirty-one sections.[18] This statute, as

10. Rev. Stat. 1838, p. 693.
11. Rev. Stat. 1838, p. 537.
12. Rev. Stat. 1846, p. 727.
13. Rev. Stat. 1846, Chap. 126, p. 554; C. L. 1857 (5068)-(5101). See C. L. 1871, (6789-6822).
14. §§1-6 and 13 amended by Act 127 of the laws of 1869; §6 being again amended by Act 184 of 1873; and §2 being again amended by Act 151 of the Public Acts of 1877.
15. How. Ann. Stat. (1882), §§8377-8398.
16. An act to provide for the better security of mechanics and other persons furnishing labor or materials for the erection, altering, repairing, beautifying or ornamenting of buildings in the State of Michigan.
17. Spry Lumber Co. v. The Sault Savings Bank & Loan Trust Co., 77 Mich. 199 (202), 43 N W. 778.
18. Act 179 of 1891.

amended from time to time,[19] constitutes the present mechanics' lien law of our state.

§ 3. Constitutionality of the Michigan Lien Statute.

The Michigan statute deals with the remedy only. It does not enlarge or restrict the contract rights of the parties, and is not open to the objections: that it impairs the obligation of contracts,[20] that it invades or destroys vested property rights,[21] or that it is class legislation.[22] Act 394 of the Public Acts of 1913, amending section 10 of the statute, has been sustained against the objections that its object was not expressed in its title,[23] that its purpose was double, and that it was in violation of section 3 of Article II of the State Constitution insuring the right of trial by jury, etc.[24] The Lien Law of 1887 was declared to be invalid[25] while Act 216 of 1885 and the present law of 1891 have each been held to answer the constitutional tests.[26]

§ 4. Principles and Rules Surrounding the Construction of the Michigan Lien Statute.

The Michigan statute contains a declaration that it is intended to be remedial and to be construed liberally to se-

19. Sections 1, 6 and 9 as amended by Act 199 of 1893; sections 1, 2, 7, 9, 12 and 27 as amended by Act 143 of 1897, C. L. 1915, (14796-14826); the title and sections 1 and 29 as amended by Act 17 of 1903; section 1 as amended by Act 121 of 1909, C. L. 1915 (14796) and section 10 as amended by Act 394 of 1913, C. L. 1915 (14796-14825) How. 2nd Ed. §§13766-13796, C. L. 1897 (10710-10739).

20. Smalley v. Gearing, 121 Mich. 193-198, 79 N. W. 1114, 80 N. W. 797.

21. Hanes & Co. v. Wadey, 73 Mich. 180-181, 41 N. W. 222.

22. Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 23 D. L. N. 73 (77), 157 N. W. 96.

23. Barnard v. McLeod, 114 Mich. 73, 72 N. W. 24.

24. C. H. Little Co. v. L. P. Hazen Co., 185 Mich. 316 (321-324), 152 N. W. 95.

25. Spry Lumber Co. v. Trust Co., 77 Mich. 199, 43 N. W. 778; Mellis v. Race, 78 Mich. 80, 43 N. W. 1033; Snell v. Race, 78 Mich. 334, 44 N. W. 286.

26. McHugh v. Gault, 86 Mich.

cure the beneficial results, intents and purposes thereof; it also provides that substantial compliance with its provisions shall be sufficient for the validity of the lien or liens provided for and to give jurisdiction to the courts to enforce them.[27] The statute was intended to protect subcontractors, material men and laborers, and its benefits should not be frittered away by construction.[28] Notwithstanding this provision and declaration, the Michigan Supreme Court has consistently and repeatedly held that, as mechanics' liens are in derogation of common law and purely statutory, the law must be rigidly followed in all proceedings preceding or antedating the attaching of the lien, and that the statute and all proceedings to comply therewith and to acquire liens thereunder are to be subjected to a strict construction.[29] In

135, 48 N. W. 869; Barnard v. McLeod, 114 Mich. 73, 72 N. W. 24; Smalley v. Gearing, 121 Mich. 193-198, 79 N. W. 1114, 80 N. W. 797.

Upon the validity of Mechanics' Lien laws in general, see: Notes 4 Am. & Eng. Ann. Cas. 620-622; 11 Id. 714-716; 20 L. R. A. 565; 39 L. R. A. (N. S.) 868, 36 Id. 574; Jones on Liens, 3rd Ed. §§1235, 1616a; Rockel on Mechanics' Liens, §4; Boisot on Mechanics' Liens, §§22-33; Phillips on Mechanics' Liens, 3rd Ed. §§26-34.

27. Section 27 of Act 179 of 1891 as amended by Act 143 of 1897; C. L. 1915 (14822); How. 2nd Ed. §13792; C. L. 1897 (10736); Smalley v. Gearing, 121 Mich. 203, 79 N. W. 1114, 80 N. W. 797.

Although mechanics' liens are the creation of statute, the legislation being remedial should be so construed as to effectuate its object. Davis v. Alvord, 94 U. S. 545, 24 L. Ed. 283; Mining Co. v. Cullins, 104 U. S. 176, 26 L. Ed. 704. Substantial compliance, in good faith, with the requirements of the particular law is sufficient, and the test of such compliance is to be found in the statute itself. Springer Land Association v. Ford, 168 U. S. 524, 18 S. Ct. 174, 42 L. Ed. 174.

28. Smalley v. Gearing, 121 Mich. 198, 79 N. W. 1114, 80 N. W. 797; Scales v. Griffin, 2 Doug. 54 (58); Wilkinson on Mechanics' Liens, pp. 5-6.

29. Wildey v. Gillett, 171 Mich. 163 (158), 136 N. W. 1116; Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141 (148), 71 N. W. 466; Sheridan v. Cameron, 65 Mich. 680 (683). 32 N. W. 894; Lacy v. Piatt Power & Heat Co., 157 Mich. 544, 122 N. W. 112; Hall v. Erkfitz, 125 Mich. 335, 84 N. W. 310; Keister v. Donovan, 173 Mich. 328, 139 N. W. 74; Burman v. Ewald, 192 Mich. 293, 158 N. W. 853, 23 D. L. N. 449; Sterner v. Haas, 108 Mich. 488, 66 N. W. 348; it does not follow because a debtor is subject to judgment and execution that his property is subject to lien and a debtor's rights require the creditor to comply with the statute. Bat-

keeping with this, the Michigan Court has held that, as the lien in order to exist must rest in strict right and not upon mere equities, the claimant is entitled to a lien only where the statute in all essentials is followed and where every fact material to jurisdiction appears upon the record.[30] Rights under the lien law cannot be extended beyond the statutory provisions,[31] and the burden of proof of every prerequisite essential to establish a lien is held to be upon the lien claimant.[32] After the lien has once been perfected and has attached, however, a different rule is applied and a liberal construction should and will be put upon both the statute and the subsequent proceedings for the purpose of fulfilling its objects and declared purpose.[33]

tle Creek Lumber Co. v. Poland, 150 Mich. 690, 114 N. W. 671; Roberts v. Miller, 32 Mich. 289; Gibbs v. Hanchette, 90 Mich. 661, 51 N. W. 691; National Bank v. National Bank, 100 Mich. 495, 59 N. W. 231; Godfrey Lumber Co. v. Kline, 167 Mich. 629 (632), 133 N. W. 528; Wagar v. Briscoe, 38 Mich. 592; Clark v. Raymond, 27 Mich. 456 (458); Willard v. Magoon, 30 Mich. 273 (281); Lindsay v. Huth, 74 Mich. 712, 42 N. W. 358; Zilz v. Wilcox, 190 Mich. 486, 23 D. L. N. 24 (25, 27), 167 N. W. 77; in holding the statute provision regarding service of claim of lien to be strictly construed and personal service to be imperative where possible. Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578 (580, 583), 132 N. W. 117; See: Peninsular Electric Co. v. Norris, 100 Mich. 496, (502), 59 S. W. 151; J. W. McCausey & Co. v. Gittleman, 201 Mich. 8, 166 N. W. 896 (898).

30. Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578 (580), 132 N. W. 117; Kleinert v. Knoop, 147 Mich. 387, (389), 110 N. W. 941; Battle Creek Lumber Co. v. Poland, 150 Mich. 690, 114 N. W. 671 Wildey v. Gillett, 171 Mich. 157, 136 N. W. 1116; Godfrey Lumber Co. v. Kline, 167 Mich. 629 (635), 133 N. W. 528; Wagar v. Briscoe, 38 Mich. 592; Clark v. Raymond, 27 Mich. 456 (458)

31. Sterner v. Haas, 108 Mich. 488, 66 N. W. 348.

32. Roberts v. Miller, 32 Mich. 289; Clark v. Raymond, 27 Mich. 462; Wagar v. Briscoe, 38 Mich. 592.

33. Godfrey Lumber Co. v. Kline, 167 Mich. 629 (632), 133 N. W. 528; Zilz v. Wilcox, 190 Mich. 486, 23 D. L. N. 24 (27), 167 N. W. 77; Burman v. Ewald, 192 Mich. 293 23 D. L. N. 449, 158 N. W. 853; Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141 (148), 71 N. W. 466; Sheridan v. Cameron, 65 Mich. 680 (683), 32 N. W. 894; Lacy v. Piatt Power & Heat Co., 157 Mich. 544, 122 N. W. 112; See: Kleinert v. Knoop, 147 Mich. 387, (389), 110 N. W. 941.

§ 5. Statutory Construction of Certain Terms.

The statute[34] construes certain of the terms which it uses, the provisions in that regard being substantially: The words "owner, part owner or lessee" shall be construed to include all the interest, legal or equitable, such person may have in the real estate upon which the improvements contemplated by this act are made, including the interest held by any person under contracts of purchase, whether in writing or otherwise. The word "material-man"[35] shall be construed to include all persons by whom any materials are furnished in or for building, altering, improving, repairing, erecting, or ornamenting, or putting in any house, building, machinery, wharf or other structure or walk or walks. The word "laborer" shall be construed to include any mechanic, work-

The most logical view appears to be that lien laws create both a right and a remedy and are subject to both rules of construction; that is, where the question is whether the particular case is within the statute a strict construction should be given, but where the circumstances are such that there is clearly a right to a lien under the statute and the question is whether the claimant has taken the proper course to establish his lien, the statute should be liberally construed. An application of this distinction to the facts of particular cases will reconcile most of the seemingly conflicting decisions. 27 Cyc. pp. 20, 21.

Upon principles and rules of construction of Mechanics' Lien laws in general. See: Boisot on Mechanics' Liens, §§34-45; Rockel on Mechanics' Liens, §8; Phillips on Mechanics' Liens, 3rd Ed. §§14-24; Houck on Law or Liens, §§59-75.

34. Section 29 of Act 179 of 1891 as amended by Act 17 of 1903; C. L. 1915 (14824); How. 2nd Ed. §13794; C. L. 1897 (10738).

35. A contractor who furnished material was, for the purpose of distribution of payments, considered a material man. Smalley v. Gearing, 121 Mich. 191, 79 N. W. 1114, 80 N. W. 797. Manufacturers of window frames, sash, doors and such material in their own shops selling same for use in a building under construction, are material men rather than contractors, and need not furnish contractor's statement as prerequisite to lien. Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111 (114), 82 N. W. 801. Plaintiffs furnishing lockers for a building consigned to contractor "knocked down and on board cars" at destination, were held material men. People v. Title Guaranty & Trust Co., 154 Mich. 614, 118 N. W. 586. Plaintiffs who after contracting with the contractor engaged in constructing a city sewer to manufacture and furnish cement blocks, made the same with machines furnished by the general contractor delivering them on the

man, artisan or laborer, employed in or about any such work. The word "improvements" shall be construed to include sidewalks.

§ 6. Operation as Being Prospective or Retrospective.

The general rule may be stated to be that statutes will be construed to operate prospectively except where a contrary intention is expressed.[36] A lien claimant does not however acquire a vested right in the existing statute or remedy,[37] so as to be entitled to the benefit of its provisions in the enforcement of his lien unchanged. In sections 30 and 31[38] of the lien law, the act was limited in operation to liens under future contracts, and in the provision for the repeal of the previously existing law a clause was inserted saving rights under existing contracts and in pending proceedings and continuing the previous law in force to effectuate that purpose. While that reservation and saving clause would, in view of the general rule above stated and the rule that an act after amendment is as amended to be treated as a single enactment, appear to apply to amendments and render them prospective only in operation, the Supreme Court in a recent case[39] has taken the opposite view. It therein held that, as the amendment to section 10 of the lien law[40] by Act 394 of the Public Acts of 1913, permitting sureties on contractors' bonds given to protect owners against liens, to be made parties to suits to foreclose

line of the sewer though never undertaking to perform any part of the original contract, with the city, were held material men. Keunzel v. Nat'l Constr'n Co. 159 Mich. 133, 123 N. W. 801. On the other hand, a plumber and gas fitter furnishing material and labor for plumbing, roofing, steam heating and electric wiring in a building, is not a material man but a contractor, though no aggregate price for the work was agreed upon. Sterner v. Haas, 108 Mich. 488, 66 N. W. 348. For further cases upon who are subcontractors and who are material men, see note to §136.

36. 27 Cyc. 22.

37. Hanes & Co. v. Wadey, 73 Mich. 180-181, 41 N. W. 222.

38. C. L. 1915 (14825-14826), How. 2nd Ed. §§13795-13796, C. L. 1897, (10739).

39. C. H. Little Co. v. L. P. Hazen Co., 185 Mich. 316, (321), 152 N. W. 95; see, also Hanes Co. v. Wadey, 73 Mich. 178, 41 N. W. 222.

40. C. L. 1915 (14805), How 2nd Ed. §13775, C. L. 1897 (10719).

liens and requiring the court to determine the rights of all parties to the time of entry of the decree, related only to the remedy and not to the established rights of the parties, it applied and could constitutionally apply to proceedings already commenced and in which an order sustaining a demurrer had been entered before the amendment took effect. It may therefore be apprehended that future amendments relating to the remedy only will be held to apply to all existing contracts and liens though made or perfected previous to the passage of the amendment, unless a contrary intent is expressed.[41]

41. As to those matters which pertain to the substantial property rights of the parties, the statute in force when the contract was entered into governs while as to matters pertaining to the remedy or procedure only, the law as it stands at the time of enforcement will govern, in the absence of saving clauses retaining the former law in force as to accrued liens. Jones on Liens, 3rd Ed. §1184a.

Effect of changes in or repeals of Mechanics' Lien laws and whether restrospective in operation. Jones on Liens, 3rd Ed. §§108-109; Rockel on Mechanics' Liens, §§5-7; Boisot on Mechanics' Liens, §§46-49; Phillips on Mechanics' Liens, 3rd Ed. §§22-25.

CHAPTER II.

PERSONS, PROPERTY, INTERESTS, STRUCTURES OR IMPROVEMENTS SUBJECT TO LIEN.*

§ 7. In General as to Persons Reached.
8. In General as to the Interest Reached.
9. Extent of Description Affected by Right to Lien.
10. Effect of Disposal of Interest.
11. Lessees and Vendees.
12. Liens Where Title Not in Contractee.
13. Homesteads.
14. ——— Attaching of Lien to Excess over Exemption.
15. ——— What Constitutes a Homestead.
16. Estates by Entireties.
17. ——— What Constitutes.
18. Lands of Married Women.

§ 7. In General as to Persons Reached.

In general, the statute extends the right to claim liens for the furnishing of material and labor, to all furnishing under contract, written or unwritten, express or implied, and no exceptions as such are stated in the statute.[1] The right to lien exists against every owner, part owner or lessee, including purchasers of land under contracts in writing or otherwise, and extends to their full interest, legal or equitable, presently held or acquired subsequent to the time of filing the claim of lien.[2] Corporations as well as natural persons are reached by the lien law and practically all who

*In general as to the subjects comprehended in Chapter II, see title, "Mechanics' Liens," 34 Cent. Dig. §§ 16-22, 64-67, 309-335, and 13 Dec. Dig. §§ 10-14, 15-21, 56-73, 180-193.

1. See, however, section 2 of the statute. 27 Cyc. 24.

2. Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578 (579), 132 N. W. 117.

have the right to contract or in whose behalf valid contracts may be made are subject to its provisions. The courts to the time of this writing have noted exceptions of public corporations[3] and of railway companies for materials used in construction of the railway.[4]

§ 8. In General as to the Interest Reached.

For the purposes of the lien law the term "owner, part owner or lessee" is construed to include all the interest, either

3. These are governed by §§ 10-743-10745, C. L. 1897, superseded by Act 187 of 1905, C. L. 1915 (14827) - (14830), How. 2nd Ed. §§13839-13842. Contractors upon public buildings, works or improvements are required to furnish, and public officials are required to exact, bonds which will protect the public and the furnishers of materials and labor used in building, repairing or ornamenting such buildings, works or improvements. The right to lien against a county for the construction of a court house was denied in Knapp v. Swaney (56 Mich. 345, 23 N. W. 162), and was also denied to subcontractors and materialmen as against the State Board of Education for labor and materials furnished for a public structure in Ford v. State Board of Education, 166 Mich. 658, 132 N. W. 467. See 27 Cyc. 25-27; Wilkinson on Mechanics' Liens, p. 32. Where a subcontractor, who provided work, labor and materials on a county building in Wisconsin, brought suit in that jurisdiction under Wisconsin statutes authorizing judgment against the county for the indebtedness due from the principal contractor, he obtained a lien on the funds due from the county to the contractor and was entitled to priority of payment over other creditors later commencing proceeding to enforce their liens. Rickman v. Rickman, 180 Mich. 224 (231-233, 248-249), 146 N. W. 609. Right to mechanics' liens upon public property. Notes 33 Am. & Eng. Ann. Cas. 102-106; 17. Id. 131-132; 26 Id. 762-764. Right to lien against charitable or religious institution exists. Note, 38 Am. & Eng. Ann. Cas. 1145-1146.

4. In Detroit Trust Co. v. Detroit, Flint & Saginaw Railway, 159 Mich. 442 (453), 124 N. W. 45, right to lien as against an electric railway for machinery for the power plant was denied, the court accepting the construction placed upon the Michigan statute by the United States Circuit Court of Appeals in Pennsylvania Steel Co. v. Potts Salt and Lumber Co., 63 Fed. 11 (13-15), where it was held the statute did not give a lien for steel rails furnished for a railroad. 27 Cyc. 26-27; Buncome County v. Tommey, 115 U. S. 122, 5 S. Ct. 626, 29 L. Ed. 305; Wilkinson on Mechanics' Liens, p. 30. See Prather Engineering Co. v. Detroit, Flint & Saginaw Ry. Co., 152 Mich. 582, 116 N. W. 376. Laborers and materialmen furnishing or performing for the constructing or repairing of railroads are protected by Act 100 of 1871, C. L. 1915 (8336-8338), How. 2nd Ed. §§6708-6710, C. L. 1897 (5243)-(5245), under which railroad companies are required to see that furnishers of

legal or equitable which such person may have in the real estate upon which the improvements contemplated by the act are made, including the interest held by any person under contract of purchase, whether in writing or otherwise.[5] Both the interest possessed at the time of commencement of work or furnishing of material for the improvement and all subsequently acquired interest of such owner, part owner or lessee are subject to the provisions of the law and to lien when properly claimed and perfected,[6] but no lien can attach to anything beyond the actual interest in the property of the person contracting for the structure or improvement[7] in the absence of exceptional circumstances.

materials, other than iron and equipment, and laborers are paid before paying contractors or subcontractors. Application of right to Mechanics' Liens to railroad property. Notes: 7 Am. & Eng. Ann. Cas. 269-272; 28 Id. 95-98.

5. § 29 of Act 179 of 1891, C. L. 1915, (14824), How. 2nd Ed. §13794, C. L. 1897, (10738); 27 Cyc. 29-30, 54-66.

6. §1 of Act 179 of 1891 as amended by Act 121 of 1909, C. L. 1915 (14796), How. 2nd Ed. §13766, C. L. 1897 (10710); Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578, (579), 132 N. W. 117.

7. Wagar v. Briscoe, 38 Mich. 587, (594-596); Scales v. Griffin, 2 Doug. 54 (64, 65); Merrill v. Brant, 175 Mich. 182 (184-5), 141 N. W. 550, where it was held an owner's property cannot be subjected to lien and taken to satisfy an indebtedness incurred by his lessee under a contract to which he was not a party. The lien reaches only the actual interest in the property of the person contracting for the structure; and where the contract with a lessee is subject to the lessor's lien for indebtedness under his contract with the lessee, not recorded until after the performance of the work for which lien was claimed, such lien cannot cut off or have priority over the lien of the lessor; Peninsular Electric Co. v. Norris, 100 Mich. 496 (504-505), 59 N. W. 151. For reference to exceptional circumstances mentioned in the text, see §11, note 14.

Any person having an interest in real property with capacity to contract may create a right to lien to the extent of his interest. The vendee under a land contract or a lessee may subject his interest to lien, and where the improvements are contemplated under contract of sale or lease may subject owner's interest to lien, though ordinarily the lien will only extend to the interest of the person contracting for the improvement or structure and to the structure itself where new. In Houck on the Law of Liens, §49, it is said: "The quantity of estate held by the owner does not seem to be material, for the lien can only attach to his interest, and to no more. What that interest is, it is the business of the builder or materialman to discover before work is begun or materials are furnished. The law makes it the duty of all persons, who contract, to ascertain the nature of the interest they acquire. This rule imposes no greater hardship or in-

§ 9. Extent of Description Affected by Right to Lien.

The lien attaches not only to the structure and its appurtenances but as well to the entire interest, legal or equitable, presently owned or subsequently acquired,[8] of the person contracting for the structure or improvement in the appurtenant real estate, the statute provision being: that the contractor, furnisher or performer shall be entitled to lien upon such house, building, machinery, wharf, walk or walks, and other structure, and its appurtenances, and also upon the entire interest of such owner, part owner or lessee in and to the lot or piece of land, not exceeding one quarter section of land, or if in any incorporated city or village, not exceeding the lot or lots upon or around or in front of which such improvement is made, to the extent of the right, title and interest of such owner, part owner or lessee at the time work was commenced or materials were begun to be furnished by the contractor under the original contract, or by the subcontractor who furnishes, or is furnished with any labor or material in the performance or execution of such sub-contract, and also to the extent of any subsequently acquired interest of any such owner, part owner or lessee, and in case of the construction of a number of buildings or walks under one contract upon, around or in front of, the same lot or contiguous lots for the same owner, part owner or lessee, of any interest in the real estate upon which said buildings are situated or upon, around or in front of which said walk or walks are built or repaired; and that such lien

convenience on mechanics than on other individuals."

As to a vendee's interest, see: Jones on Liens, 3rd Ed. §§1247-1250, 1252, 1257, 1258; Rockel on Mechanics' Liens, §143; Boisot on Mechanics' Liens, §§300-311; Phillips on Mechanics' Liens, 3rd Ed. §§69-73; Houck Law of Liens, §§49-55, 77; Overton on Liens, §§535-537, 544; Kneeland on Mechanics' Liens, 2nd Ed. §§17-19. As to a Lessee's interest: See Jones on Liens, 3rd Ed. §§1245, 1272-1282; Rockel on Mechanics' Liens, §§141, 143; Boisot on Mechanics' Liens, §§130-134, 289-299; Phillips on Mechanics' Liens, 3rd Ed. §§83-93; Houck Law of Liens, §§83-84; Kneeland on Mechanics' Liens, 2nd Ed. §§39-43; Overton on Liens, §557. See Notes, 3 Am. & Eng. Ann. Cas. 1096-1098; 14 Id. 1031; 22 Id. 316-317; 23 L. R. A. (N. S.) 601-618; 62 L. R. A. 380.

8. Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578 (579), 132 N. W. 117; 27 Cyc. 227-229.

for such material or labor so furnished, shall attach to all of said buildings, walk or walks, together with the land upon, around or in front of which the same are being constructed, the same as provided in case of a single building, walk or improvement.[9] It is the general rule that the lien attaches to the extent of the statutory limit.[10]

9. §1 of Act 179 of 1891 as amended by Act 199 of 1893, Act 143 of 1897, Act 17 of 1903 and Act 121 of 1909; C. L. 1915 (14796), How. 2nd Ed. §13766, C. L. 1897 (10710).

It may be a question of fact whether the lien shall attach to all or a part only of the land within the maximum quantity fixed by law. It would not necessarily follow, because a structure had been erected upon some part of a farm of 160 acres, that the lien extended to 160 acres. And it does not necessarily follow because a block in a city is divided into lots, that a lien may not attach to more of those lots than are covered, or partly covered, by the structure erected. A factory building, though built upon and covering only two platted lots in a city block, may be said to be built upon contiguous territory in the block necessary to the convenient enjoyment and use of the buildings. Assuming an entire block to have been selected as a proper site for, and devoted to the use of, a factory and its material and products, it would be a narrow construction of this statute which would, in all cases, limit the lien to the particular lots upon which a particular building stood. Adams v. Central City Granite, etc., Co., 154 Mich. 448 (455), 117 N. W. 932. In this case a company had purchased a large number of city lots extending over or into several blocks and had erected a brick factory on a few of the lots, to utilize the deposit found upon the balance of the property. It was held that the lien extended only to the building and to the lots upon which it was located. Where the building for which material was furnished was a hotel on one lot, with a wing used for a barber shop on another lot and the proof showed that the timber furnished was used in both which were being erected together, it was held that they should be treated as one parcel and that the lien attached to both. Lamont v. LeFevre, 96 Mich. 175 (178), 55 N. W. 687. Where a claimant seeks to reach more than the statutory quantity of land, he should advance reasons and facts in support of his demands. Adams v. Central City Granite, etc. Co., 154 Mich. 448 (456), 117 N. W. 932.

Generally as to lands covered or subjected to lien, see 27 Cyc. 221-226. As to several houses on different lots constructed under single arrangement, see Wilkinson on Mechanics' Liens, pp. 19-20.

Mechanics' liens in cases of separate or non-contiguous lots or buildings; in cases where there are separate buildings under single contract; in cases of work under different contracts and in cases of buildings on lots belonging to different owners; see 2 Am. & Eng. Ann. Cas. 685-687; 1 L. R. A. 514; 17 Id. 314; Boisot on Mechanics' Liens, §§170-175; Phillips on Mechanics' Liens, 3rd Ed. §§324, 369-377; Kneeland on Mechanics' Liens, 2nd Ed. §§100-105. Right to joint or several lien on building or buildings created or improved under entire contract on lots owned in severalty. See Notes, 24 Am. & Eng. Ann. Cas. 873-877; 30 L. R. A. (N. S.) 1219.

10. Adams v. Central City Gran-

§ 10. Effect of Disposal of Interest.

It is clear that the disposal of his interest by an owner, part owner or lessee who has made a contract for construction upon or improvement of premises in which he holds an interest, after the contractor or any subcontractor or material man or laborer has begun to furnish or perform under the contract, will not operate to bar the liens of those furnishing or performing at or previous to the time of such disposal.[11] However, it is probable that if the owner, part owner, or lessee, after making contract but before any service or furnishing of labor or material is done thereunder, sells to a bona fide purchaser for value, a lien would not attach to the land.[12] It may, however, be safely stated that if the purchaser knew of the contract and encouraged the

ite, etc. Co., 154 Mich. 448 (455), 117 N. W. 932. Upon property or interest subject to lien and the quantity of land reached, see: Jones on Liens, 3rd Ed. §§1368-1388; Rockel on Mechanics' Liens, §§10-11, 85 132-140; Boisot on Mechanics' Liens, §§124-160, 161-178; Phillips on Mechanics' Liens, 3rd Ed. §§186-203; Houck Law of Liens, §§173-179; Kneeland on Mechanics' Liens, 2nd Ed. §§96-110a; Overton on Liens, §§554, 558, 559.

11. 27 Cyc. 287-290. See Chapter XI, §§83-84, to effect that right to lien attaches as of date of commencement of structure or furnishing regardless of time of particular furnishing. See, however, Sheldon-Kamm & Co. v. Bremer, 166 Mich. 578-579, 132 N. W. 117, where the dictum apparently states that the date of the particular furnishing governs. If this dictum correctly states the law it inferentially overrules Kerr-Murray Manufacturing Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111 (114), 82 N. W. 801 and Kay v. Towsley, 113 Mich. 281, 71 N. W. 490.

12. See: Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578 (585), 132 N. W. 117; where three judges concur in the statement that the transfer of the title to a bona fide purchaser before performance of a contract will probably preclude a lien, which has not already attached, by reason of the furnishing of some of the labor or material under the contract, and to the extent that it shall be so furnished after the transfer, if done in ignorance of such transfer. The majority opinion in this case held: where a husband entered into a contract for the construction of a house upon land owned at the time by his wife, and shortly thereafter conveyed to both of them by the entireties, before any labor was performed or material furnished therefor, a lien would not attach for material furnished later, in the absence of the wife's signature to the contract. (Section 3 (C. L. 1915, §14798) of the act did not apply because the husband contracting had some title to the land at the time the material was furnished; the case is ruled by section 2, C. L. 1915, (14797) of the act).

construction or improvement, or if the furnishing of labor and material was going on at the time of sale and was permitted to continue, an implied contract would arise which would subject his entire interest in the property to lien.

Even in case the real estate were intermediate the entering into the contract and the first furnishing thereunder transferred to a bona fide purchaser who was without knowledge either of the contract or of the fact that the building was to be erected until after completion, the structure if new, would be subject to the right of lien.

§ 11. Lessees and Vendees.

The interest of a lessee or tenant or vendee, whatever may be its character, in the real estate and existing structure and in the structure created or fixtures attached to the building, under his contract for construction or improvement, is subject to lien.[13] The right, however, to lien upon the real estate and existing structure at least cannot extend beyond the actual interest of the vendee or tenant contracting[14] except under special circumstances.

13. Albert Gall Co. v. Dowagiac Gas Co., 160 Mich. 255, 125 N. W. 283; 27 Cyc. 30-31, 56-59.

14. Merrill v. Brant, 175 Mich. 182 (184-185), 141 N. W. 550; Peninsular Electric Co. v. Norris, 100 Mich. 496 (501-505), 59 N. W. 151. The lien under the lessee's contract attaches subject to all of the conditions of the lease. Gaskill v. Trainer, 3 Cal. 335; Williams v. Vanderbilt, 145 Ill. 238, 34 N. E. 476, 21 L. R. A. 489; 27 Cyc. 56-57. Surrender of the lease prior to expiration would not impair the right of the lienor to the security of the full leasehold although forfeiture in accordance with the terms of the lease would do so. 27 Cyc. 291. Where a vendee under a land contract surrenders or forfeits his rights thereunder, the persons holding liens upon his interest may be subrogated to the rights of such vendee as his rights existed immediately before such surrender or forfeiture, by performing the covenants in his contract within thirty days thereafter. Sec. 3 of the Act; C. L. 1915 (14798); How. 2nd Ed. §13768, C. L. 1897 (10712). On the question of the power of a lessee or vendee to subject the owner's interest to mechanics' liens, see Note to 23 L. R. A. (N. S.) 601; Wilkinson on Mechanics' Liens pp. 20-22. Where the lease or contract of sale provides for improvements, the lessor or vendor is generally held to thereby subject his interest to lien for those improvements under the contract of the lessee or vendee. 27 Cyc. 58-61.

§ 12. Liens Where Title Not in Contractee.

Any person furnishing services and materials for the erection of a new building or structure upon land to which the person contracting for such erection has no legal title, at the time of commencement of the structure or improvement, or under certain circumstances at the time of the particular furnishing is entitled to a lien therefor upon such building or structure; and the forfeiture or surrender of any title or claim of title held by such contracting person to such land does not defeat the lien upon such building or structure of such person furnishing services or materials.[15] This statutory rule does not apply and subject to right of lien a building, erected without a written contract duly signed, upon land of an owner and wife as tenants in entirety;[16] though it does give a lien upon a new house built on land constituting a homestead, where the claimants of such homestead have not the legal title but only the promise of it as a gift, where the wife did not sign the contract, but took part in the negotiations and discussions, and the lien in such case

15. §3 of Act 179 of 1891, C. L. 1915 (14798); How. 2nd Ed. §13768, C. L. 1897 (10712). It is the state of the title at the time the material is begun to be furnished or labor performed which determines whether a laborer or materialman may secure a lien on the building or structure. Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578 (582), 132 N. W. 117. In Kerr-Murray Manufacturing Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111 (114), 82 N. W. 801, following Kay v. Towsley, 113 Mich. 281, 71 N. W. 490, it was held that liens attach as of the date of the commencement of the building, erection, or other improvement, regardless of the time when, or the person by whom, the particular work was done or the materials furnished for which a lien is claimed. See §10, Effect of Disposal of Interest, note 12. As to mechanics' liens upon buildings distinct from lands, see Notes 2, Am. & Eng. Ann. Cas. 689-691; 62 L. R. A. (N. S.) 369-382; Boisot on Mechanics' Liens, §§180-183, 178.

16. Bauer v. Long, 147 Mich. 351, 110 N. W. 1059; Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578, 132 N. W. 117; Restrick Lumber Co. v. Wyrembolski, 164 Mich. 71, 128 N. W. 1083. In this case it was held that, where tenants by entireties executed a deed and took back a land contract, the transaction amounting to a mortgage, they did not divest themselves of title so as to permit the acquiring of lien against the building in a case where the wife did not sign, under the theory of the erection of a new structure on land to which the person contracting had no legal title.

may be enforced by a sale and removal of the new structure.[17] Such is not the case, however, where the land is held by a husband and wife under an executory contract to purchase as tenants by entireties, later converted into a warranty deed, and the contract is signed only by the husband.[18] Nor is such the case where a husband contracts in his own behalf for a structure on his wife's land and the claim of lien is served upon the wife and not upon him, and he is not made a party to proceedings against her to enforce the lien against the land and building.[19] The statute does not allow a lien in cases where title to the land is in a third party, unless the building or structure is a new one.[20] Where by contract with the tenant, labor and materials were furnished, the contractor is entitled to protection by lien.[21] Where the husband has no title to the land but contracts for a structure upon lands of the wife, the evidence may sustain an agency and subject the land to a lien.[22]

17. Holliday v. Mathewson, 146 Mich. 336, 109 N. W. 669. See §§13-14 post.

18. Frohlich v. Blackstock, 155 Mich. 604, 119 N. W. 906. Where a man contracted for the remodeling of a building upon land, the title to which was in his wife's mother, there being a family understanding that the lot should belong to his wife eventually and it having been for some time occupied by himself and wife, and the holder of the legal title was not a party to the contract, and there was no evidence from which the inference could be drawn that the son-in-law was acting as her agent in making the contract, it was held there was no basis for a valid lien on the real property for the value of the materials entering into the remodeling of the structure. John Wallace Sons Co. v. Wilkinson, 181 Mich. 694 (699), 148 N. W. 166.

19. Hall v. Erkfitz, 125 Mich. 332, 84 N. W. 310.

20. Fuller v. Detroit Loan & Bldg. Ass'n, 119 Mich. 71 (73-4), 77 N. W. 642.

21. Albert Gall Co. v. Dowagiac Gas Co., 160 Mich. 255, 125 N. W. 283. But where, under the law of 1833, labor and materials were furnished for a building under a contract with one holding under a land contract with which he later failed to comply thus losing any interest he had therein, it was held that no lien would lie against the owner's land. Scales v. Griffin, 2 Doug. 54 (58).

Under the law of 1846 as amended, one having at the time no title to certain land cannot, by merely contracting for material for a building to be erected upon such land, subject it to a mechanics' lien. Wagar v. Briscoe, 38 Mich. 587 (592-593).

22. Willard v. Magoon, 30 Mich. 279-280; Frohlich v. Carroll, 127 Mich. 561 (564-565), 86 N. W. 1034. In this case the court said: "Margaret Carroll owned the land; she knew the buildings were to be erected thereon; she wanted

§ 13. Homesteads.

In general, no lien can attach to a homestead or lands used and occupied as such, in the absence of a contract in writing signed by both the husband and wife.[23] The con-

them built; she used funds of her own, and borrowed more, to pay upon the contract; she drew her own personal checks to the complainant and other contractors; and she still owns the premises. She thereby recognized the contract as hers. The case is like any other case of contract made by an agent where the principal is undisclosed. See, 1 Am. & Eng. Enc. of Law. (2d Ed.) 1139; Mechem, Ag. §701, and cases cited. If it be said that the authority is not shown, we reply that we consider the record full of evidence tending to show it. It was unquestionably her property, and she acquiesced in what her husband did in relation to it. It is said that Margaret Carroll did not furnish all of the money used; but we think it is immaterial even if her husband furnished some of it, as he claims to have done."

23. §2 of Act 179 of 1891, as amended by Act 143 of 1897, C. L. 1915 (14797); How. 2nd Ed. §13767, C. L. 1897, (10711); 27 Cyc. 27-28; Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578 (579, 583), 132 N. W. 117; Holliday v. Mathewson, 146 Mich. 336 (338), 109 N. W. 669; Burtch v. McGibbon, 98 Mich. 139, 56 N. W. 1110; Hammond v. Wells, 45 Mich. 11 (13), 7 N. W. 218; Holland Furnace Co. v. Hartig, 181 Mich. 342 (346), 148 N. W. 169; John Wallace Sons Co. v. Wilkinson, 181 Mich. 693, (699), 148 N. W. 166. Mechanics' lien as reaching homestead under contract not joint. 9 Am. & Eng. Ann. Cas. 12; 9 L. R. A. 805; Jones on Liens, 3rd Ed. §1382; Boisot on Mechanics' Liens, §§135-142. In a case arising upon a contract made prior to the amendment of this section in 1897, it was held that, under Section 2, Art. XVI of the State Constitution of 1850, and regardless of the original act of 1891 or any other statutory provision, the homestead right of a wife could not be taken from her by way of mechanics' lien or otherwise, without her written consent. Jossman v. Rice, 121 Mich. 270 (274-277), 80 N. W. 25. Since the amendment of this section by the act of 1897 the wife's rights in a homestead have been safeguarded both by constitutional and statutory provisions. See: 1909 Mich. Const., Art. XIV, Sec. 2. Under the act of 1891 as amended in 1897, it was held that a contract for a house to be erected upon land constituting a homestead must be signed by the wife also to give a basis for a lien upon the land, although under section 3, the title being in a third person, the lien would attach to the building separately and could be enforced by its sale and removal. Holliday v. Mathewson, 146 Mich. 336, 109 N. W. 669. A homestead may be claimed by a tenant in common. King v. Welborn, 83 Mich. 195 (197), 47 N. W. 106 and cases there cited.

The homestead exemption extends and is limited to the premises actually occupied, though several dwellings are erected on one lot. Frohlich v. Carroll, 127 Mich. 561 (567), 86 N. W. 1034. Or the building is constructed upon two or more lots. King v. Welborn, 83 Mich. 195 (198), 47 N. W. 106. Where materials were furnished to the contractor for use in remodeling an old building upon premises claimed to be a home-

tract, even though in writing, must show an intent to include the homestead interest in order to subject it to lien.[24] There is nothing in the statute requiring the owner to give notice to the contractor, subcontractor or material man that such owner claims the premises as a homestead. It is the fact of its being or not being a homestead that determines the right to or freedom from lien in the absence of a written contract properly signed.[25]

§ 14. ——— Attaching of Lien to Excess Over Exemption.

The general rule above stated is not, however, absolute. Where improvements have been made upon a homestead, in pursuance of a contract signed by either the husband or wife alone, there appears to be a distinction in the cases to the effect that, where the one who signs the contract owns the land, a lien will attach for the excess value over $1,500;[26] but where the one signing the contract does not hold the title to the land, no lien will attach, although the homestead

stead and owned by a married woman and her mother, the contract being signed by the husband only and he not acting as the agent of either of them, the wife's failure, as well as that of her mother, to sign the contract was held fatal to any claim of lien. John Wallace Sons Co. v. Wilkinson, 181 Mich. 693 (696-698), 148 N. W. 166. If it were a homestead (but which question the court did not deem it necessary to pass upon) the omission of the wife's signature was fatal; if it were owned by the mother alone, the fact that she was not a party to the contract was fatal; and the fact that it was an old building prevented a lien upon the structure under section 3 of the act.

24. Burtch v. McGibbon, 98 Mich. 139, 56 N. W. 1110; Hammond v. Wells, 45 Mich. 11, (13), 7 N. W. 218.

25. Mills v. Hobbs, 76 Mich. 122 (126), 42 N. W. 1084; This was a case under the law of 1887, holding that, where a claim of homestead was relied upon as a defense, the question was as to the homestead character and value of the premises at the time the lien was claimed to have attached.

26. Scott v. Keeth, 152 Mich. 547 (551-552), 116 N. W. 183; McAllister v. Des Rochers, 132 Mich. 381 (383-385), 93 N. W. 887; Lamont v. LeFevre, 96 Mich. 175 (176, 178), 55 N. W. 687; Mills v. Hobbs, 76 Mich. 122 (126-127), 42 N. W. 1084. To reach the excess value of a homestead over $1,500 in a case where the excess is properly subject to lien, the premises may be sold, Lamont v. LeFevre, 96 Mich. 175 (178), 55 N. W. 687; McAllister v. Des Rochers, 132 Mich. 381 (384), 93 N. W. 887.

is worth in excess of $1,500.[27] We cannot, however, regard the law upon this subject as settled, as the case stating the latter proposition was based upon prior cases[28] which arose and were determined in the application of the provisions of the statute relating to estates by entireties rather than to cases of estates in homesteads; it may be fair to assume that the later case (Holland Furnace Co. v. Hartig) has the effect to overrule the earlier cases cited, and that the true rule when declared will be that no lien will attach to a homestead interest in real property even though it be worth more than $1,500 unless the statute is complied with and the contract is signed by or on behalf of both the husband and wife.

§ 15. ——— What Constitutes a Homestead.

Present intention of occupancy as a homestead, with present action to carry the intention into effect, constitutes a homestead in law.[29] A homestead can be claimed in premises used partly for business purposes and partly as a dwelling, if the owner has no other home at the time.[30] Where the parties purchased the premises for a homestead before

27. Holland Furnace Co. v. Hartig, 181 Mich. 342 (346-347), 148 N. W. 169. In this case complainant installed a furnace in the homestead of defendants, the title to which was in the husband alone, under a contract signed by the wife only, she having no authority and not acting as her husband's agent, in signing the same, and he at no time recognizing the written agreement; it was held that no enforceable lien was acquired against the property, although it was worth in excess of the homestead exemption.

28. McMillin v. Schneider, 147 Mich. 258, 109 N. W. 661; Bauer v. Long, 147 Mich. 351, 110 N. W. 1059.

29. Mills v. Hobbs, 76 Mich. 122 (125-126), 42 N. W. 1084. In this case a vacant and unimproved lot was purchased in March, 1887, by a woman with the intention of eventually occupying it as a homestead with her husband. A year later she caused some shade trees to be planted along the front of the lot, and about five months thereafter she made a verbal contract for the erection of the house. At the time neither she nor her husband had any other homestead. It was held that, under these circumstances, the premises constituted a homestead.

30. Lamont v. LeFevre, 96 Mich. 175 (178), 55 N. W. 687; Deville v. Widoe, 64 Mich. 593 (594-595), 32 N. W. 894; King v. Welborn, 83 Mich. 195 (197), 47 N. W. 106.

contracting for a building thereon, and later moved into a part of the building with the intention of making it their home, they thereby acquired a homestead.[31] A homestead exemption may be claimed in land purchased as a homestead for the parties and moved onto by them with the design of making it their home.[32]

§ 16. Estates by Entireties.

No lien can attach to land held by entireties, that is, held by husband and wife jointly, unless the contract for the improvements thereon is in writing and signed by both.[33] Nei-

31. Lamont v. LeFevre, 96 Mich. 175 (178), 55 N. W. 687. It has been held that where the lien attached before the homestead it might be enforced regardless of the homestead. Tuttle v. Howe, 14 Minn. 145, (reprint 113).

32. Lamont v. LeFevre, 96 Mich. 175 (178), 55 N. W. 687; Deville v. Widoe, 64 Mich. 593 (594-595), 32 N. W. 894. In the latter case the court held that a city lot, purchased with the intention of making it a homestead for the purchaser and his family, would be exempt from levy and sale on execution from the time of purchase, even though unimproved and without a dwelling thereon, if the purchaser enclosed it and used and occupied it with the constant purpose of making it his home, and used the proceeds thereof and such means as he could procure, within a reasonable time, to erect a house thereon for his family, provided it did not exceed in quantity and value the constitutional limit,—and that what would be regarded as a reasonable time must necessarily depend upon the circumstances of each particular case. A homestead cannot be claimed in premises upon which a house is under construction for claimant when, at the time the contract was made and the work commenced, he owned and was occupying a house in another part of the same city. McMonegal v. Wilson, 103 Mich. 264 (267-268), 61 N. W. 495; Delray Lumber Co. v. Keohane, 132 Mich. 17 (19), 92 N. W. 489. In McMonegal v. Wilson, supra, the court said: "Whatever might be said if, at the time this lot was purchased and the labor commenced, the defendant had been without a homestead elsewhere, and the testimony showed that the lot in question was purchased for a homestead, no such liberality of construction of the homestead law is permissible as will entitle the party to two homesteads at the same time, —the one actual and the other potential."

33. §2 of Act 179 of 1891, amended by Act 143 of 1897, C. L. 1915 (14797), How. 2nd Ed. §13767, C. L. 1897, (10711). Estates by entirety or community property as subject to mechanics' lien for work under contract with one spouse only. Note 11 Am. & Eng. Ann. Cas. 87-88; Boisot on Mechanics' Liens, §§128-129. It is only when land is owned by husband and wife, by entireties, or when the land is held and occupied as a homestead, that a contract for a building thereon is required to be in writing, and signed

ther husband nor wife has any interest in an estate by the entirety separable from that of the other, and no interest

by both the husband and wife, in order that a lien may attach to either land or building. In every other case the contract for the improvement may be written or unwritten, express or implied. Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578 (579, 583), 132 N. W. 117; Bauer v. Long, 147 Mich. 351, 110 N. W. 1059; McMillin v. Schneider, 147 Mich. 258 (263-264), 109 N. W. 661; Frolich v. Blackstock, 155 Mich. 604, 119 N. W. 906; Restrick Lumber Co. v. Wyrembolski, 164 Mich. 71, 128 N. W. 1083; Burman v. Ewald, 192 Mich. 293, 23 D. L. N. 449, 158 N. W. 853. In Burman v. Ewald, 192 Mich. 293, 23 D. L. N. 449, 158 N. W. 853, the contract was signed by the wife alone, for herself and husband, for a building upon land owned by them jointly, and the husband had told the contractor that his wife was looking after the business and they must deal with her. He later joined with her in a mortgage to secure funds with which to pay for the structure. It was held that, as a lien must rest in strict right and not upon mere equities, the contractor was not entitled to a lien in the absence of the husband's signature. In Bauer v. Long, 147 Mich. 351, 110 N. W. 1059, the husband contracted for a structure upon land owned by himself and wife jointly as tenants in entirety. The court said: "The bill shows that complainant knew how the title was held; that the building was to be so constructed that it became a part of the realty, and could not be removed after its erection, without injury to the freehold, and that he has so constructed it. His bill is framed upon that theory, for it does not pray for a lien upon the building separate and apart from the land on which it is situated. This court has repeatedly held that one tenant by the entirety has no interest separable from that of the other. He has nothing to convey or mortgage or to which he can attach a lien. * * * In view of this condition of the law, and to protect the rights of each, the legislature enacted that this lien might attach if the lienor secured the written contract of the husband and wife. To hold that either might contract for a lien without the assent of the other would be clear judicial legislation. The complainant seems to concede that he has no lien upon the land, but claims the right to a lien upon the dwelling house, and to sell and remove it under his lien proceeding. This case does not fall within (14798) Michigan Comp. Laws, providing for a lien upon the building if the building is upon lands 'to which the person contracting for such erection has no legal title,' or within the decision of Holliday v. Mathewson (146 Mich. 336.)" It was conceded that the question was before the court for the first time, and it was held that no lien attached to either land or building, in the absence of the wife's signature. In McMillan v. Schneider, 147 Mich. 258, 109 N. W. 661, the husband alone contracted for improvements upon land owned by himself and wife jointly. It was held no lien could attach. In Frolich v. Blackstock, 155 Mich. 604, 119 N. W. 906, the husband alone signed the contract for improvements upon land held by himself and wife under an executory land contract running to them jointly. They later took a warranty deed of the premises. Lien was denied upon either land or buildings in the absence of the wife's signature. In Restrick Lumber Co. v. Wyrembolski, 164 Mich. 71, 128 N. W. 1083, the husband

that either can convey or mortgage or to which either can attach a lien.[34]

§ 17. ——— What Constitutes.

Where a husband and wife held land under an executory land contract running to them jointly when the contract was signed, later taking a warranty deed of the premises, this was held an estate by entireties, and lien was refused upon either the land or buildings thereon, where the wife

alone contracted for a building upon land of which he and his wife had given a deed to secure a loan and had taken a land contract; the deed and land contract to them were held to constitute a mortgage upon property owned by them jointly, and a lien was refused in the absence of the wife's signature. In Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578, 132 N. W. 117, the husband alone contracted for a building upon land which, at the time the complainant began to furnish the material for such building, was held jointly by the husband and wife, by entireties. The husband made the contract at a time when he had no title to the land. The premises also constituted the homestead of the parties. This proved the determining factor; lien was refused in the absence of the wife's signature. The case makes the important though perhaps unsound (§83 herein) distinction that it is the condition of the title at the time the particular furnishing is begun that proves the determining factor, and not the condition of the title at the time the original contractor began to furnish material or labor. Section 2 of Act 179 of 1891 originally provided that, where the title to the land was held jointly by husband and wife, the lien should attach to both the land and any improvements made thereon, if such improvements were made in pursuance of a contract either with both of them or "with one of them by and with the knowledge and consent of the other." In spite of this express statutory provision, in a case where the husband alone signed the contract by and with the wife's knowledge and consent, the land was nevertheless held immune from lien as a homestead under the constitution of 1850 (Art. XVI, Sec. 2) in the absence of the wife's signature. Under the peculiar language of another section of the act, however, (Sec. 9, Subd. 4) the lien was held to have attached to the building. Jossman v. Rice, 121 Mich. 270, (274-278), 80 N. W. 25. That part of Section 9 involved in the Jossman Case was amended and practically repealed by Act 143 of 1897, and by the same Act, section 2 was amended to its present form so as to provide that both husband and wife must sign the contract in order that a lien may attach to either lands or buildings held jointly by them or held and occupied by them as a homestead. Hence under the present law, where the wife fails to sign the contract for a building on their homestead or joint property, this failure will in general be held fatal to any claim of lien on either land or buildings thereon. See cases cited above.

34. Bauer v. Long, 147 Mich. 351 (353), 110 N. W. 1059.

did not sign the contract.[35] Where a husband and wife had given a deed to secure a loan and had taken back a land contract, the transaction was held to be a mortgage not divesting the grantors of the legal title, and their estate was held to be one by entireties.[36]

§ 18. Lands of Married Women.

The present act contains no specific provision for liens upon the lands of married women. The general rule applies, therefore, and the contract for improvements thereon must be with such married woman or her agent in order to bind her land.[37] Where her husband or some other third party independently contracts for a new building upon her land, the lien will attach to such structure under section 3 of the law. The mere fact that a wife knows the work is being done and does not forbid it is not usually considered sufficient to subject her property to lien therefor.[38] Naming the husband alone as the owner of land and not referring to the wife who actually owns the property gives no lien against her interest.[39] The wife's dower interest is probably not affected or subjected to lien where she does not sign the contract, as the statute requires waiver or relinquishment of dower rights to be in writing.[40]

35. Frohlich v. Blackstock, 155 Mich. 604, 119 N. W. 906.

36. Restrick Lumber Co. v. Wyrembolski, 164 Mich. 71, 128 N. W. 1083.

37. 27 Cyc. 62-66. Where the contract for the erection of a new building upon a married woman's land was made with her husband and in his name only, but the evidence showed that he was at the time only acting as her agent, that she knew the building was being built upon her land, used her own money and borrowed more in her own name to pay on the contract, the lien will attach to her land. Frohlich v. Carroll, 127 Mich. 561 (564-565), 86 N. W. 1034. The estate of a married woman may be subject to lien, where the contract was by or for her and the erection or improvement was upon her credit though not where she does not expressly or impliedly consent. Jones on Liens, 3rd Ed. §§1260-1271; Rockel on Mechanics' Liens, §§31, 37-39; Boisot on Mechanics' Liens, §§269-281, 441-442, 628; Phillips on Mechanics' Liens, 3rd Ed. §§94-107; Houck Law of Liens, §§80, 218-228; Kneeland on Mechanics' Liens, 2nd Ed. §§31-34.

38. 27 Cyc. 74.

39. 27 Cyc. 168.

40. C. L. 1915 (11662), How. 2nd Ed. §10922, C. L. 1897 (8930). See Wilkinson on Me-

CHAPTER III.

LABOR AND MATERIALS FOR WHICH LIEN IS CLAIMED.*

§ 19. Work or Labor for Which Lien May Be Claimed.
20. Materials For Which Lien May Be Claimed.

§ 19. Work or Labor for Which Lien May Be Claimed.

The statute in general terms sets forth the labor and materials for which liens may be claimed. It provides substantially as follows. Every person who shall build, alter, improve, repair, erect, ornament or put in, or who shall furnish any labor or material in or for building, altering, improving, repairing, erecting, ornamenting or putting in any house, building, machinery, wharf, or structure or shall build or repair any sidewalks, or shall furnish any materials therefor, and every person who shall as subcontractor, laborer or material man perform any labor or furnish materials to such principal contractor or any subcontractor, in carrying forward or completing any such contract, shall have a lien therefor.[1] Ordinarily work or labor not speci-

chanics' Liens, p. 33. Dower is not subject to, or cut off by, lien, unless the wife has signed the contract. Rockel on Mechanics' Liens, §§148a, pp. 386-7; §152, p. 385-6; Boisot on Mechanics' Liens, §§126-127; Kneeland on Mechanics' Liens, 2nd Ed. §§24-25.

*In general as to the subjects comprehended in Chapter III, see Title "Mechanics' Liens," 34 Cent. Dig. §§23-59 and 13 Dec. Dig. §§22-54.

1. §1 of Act 179 of 1891 as amended by Act 199 of 1893, Act 143 of 1897, Act 17 of 1903 and Act 121 of 1909; C. L. 1915 (§14796), How. 2nd Ed. (§13766), C. L. 1897 (§10710). The language of the statute seems broad enough to include excavating for a building, laying foundations, masonry and concrete work, steel work, carpentering, plastering, papering, glazing, wiring, plumbing, including installing of furnace or other heating system, painting, decorating, and all work of similar character. See generally on the subject: Boisot on Mechanics' Liens, §§88-123; Rockel

fied in the statute will not furnish the basis for lien, on the ground of the maxim *expressio unius est exclusio alterius.*[2] The lien may cover labor not actually going into or incorporated in the building or improvement, if necessary to or

on Mechanics' Liens, §§12-22; Phillips on Mechanics' Liens, 3rd Ed. §§153-175; Houck on Mechanics' Liens, §§154-172; Jones on Liens, 3rd Ed. §§1309a-1367; Kneeland on Mechanics' Liens, 2nd Ed. §§71-83, 88-95a; Note 23, Am. & Eng. Ann. Cas. pp. 5-30.

Boisot on Mechanics' Liens, §§89-123, 213-215 declares the right of lien to exist for cellars and foundations; painting, glazing and paper hanging; furnaces, boilers and stacks which are permanent fixtures; fixtures, such as built in mirrors, tanks, pumps, theatre chairs and machinery; improvements, outside but appurtenant to the building, such as a connected gas machine, a drain pipe to sewer, windmill, a dam and flume as parts of a mill, poles and wires and pipes appurtenant to the plants of electric and water companies; an architect's services in superintending construction; materials furnished for work done upon them away from structure for use and actually used therein; powder and fuse used in blasting for foundations; work in preparing an old building for remodeling, etc.; but denies the right as to: portable machinery and other auxiliary or appurtenant items not becoming as fixtures, a part of the realty; grading and sodding, digging wells, paving in street as part of structure on lot facing it; cooking for men employed; transportation of materials; lightning rods; furnishing money for use in structure; tearing down and moving building; architects for plans only; materials furnished but not used; materials furnished on general account for no particular structure; unnecessary or defective materials; scaffolding used in laying brick; use of tools or lubricating oils in operating machinery; patterns used in manufacture or boxes used in shipping.

2. Boisot on Mechanics' Liens, §113; Phillips on Mechanics' Liens, 3rd Ed. §156. In Clark v. Raymond (27 Mich. 456), the labor was that of dredging out a slip for a wharf, throwing the excavated dirt within the line of the proposed wharf, scraping the same back and leveling it off. Justice Graves, with whom Justices Cooley and Christiancy concurred, said (p. 461) that he should feel much hesitation in holding that this work could be made the subject of a lien under the law. The improvement or ornamentation of grounds or land alone, as by grading and sodding, the breaking of prairie land, etc., has, in the absence of a statutory authority therefor, been held to furnish no basis for lien. 27 Cyc. 37; Boisot on Mechanics' Liens, §108; Jones on Liens, 3rd Ed. §1348; Brown v. Wyman, 56 Iowa 452, 9 N. W. 344. The right to lien for putting up lightning rods has been denied, as being neither building, altering, repairing nor ornamentation, in Drew v. Mason, 81 Ill. 498, but has been allowed on the ground of their constituting a useful protection, in Harris v. Schultz, 64 Iowa 539, 21 N. W. 22, and Quimby v. Sloan, 2 Abb. Prac. (N. Y.) 93, 2 E. D. Smith (N. Y.) 594. Ordinarily lien will not lie for razing, tearing down or removing a structure, in the absence of a statutory provision, but if the pulling down is for the purpose of rebuilding, or if the contract for the new building provides that the materials of the old building shall, as far as suit-

a part of the work of building, repairing, improving or ornamenting as the case may be, and within the scope of the contract covering such labor.[3] In general the right of lien will exist for work or labor performed away from the premises if the result of such work or labor goes into or is incorporated in the building or improvement.[4] Transportation charges to the premises or place of use have been held proper

able be used in the construction of the new building, it has been held that lien would lie. Boisot on Mechanics' Liens, §§97, 115; Jones on Liens, 3rd Ed. §§1353-1355.

3. Boisot on Mechanics' Liens, §97. It has been held that services rendered in cooking for the men employed in constructing a building, although done upon the premises, will not furnish the basis for a lien upon the structure. Rockel on Mechanics' Liens, §17; Boisot on Mechanics' Liens, §111; Jones on Liens, 3rd Ed. §1357; Perrault v. Shaw, 69 N. H. 180, 38 At. 724; McCormick v. Water Co., 40 Cal. 185. In the latter case the court said (p. 188): "On the same theory a blacksmith who shod the horses, or a grain dealer who furnished them forage whilst employed on the work, or a wagonmaker who repaired the cart of the contractor, would be entitled to a lien on the building. And if every one who contributed indirectly and remotely to the work is entitled to a lien, no reason is perceived why a surgeon called to set a broken limb of one of the laborers, whereby he will be enabled at an early date to resume work on the building, might not assert a lien; but services of this character, not performed on the building, are not within the province of the statute." But a contractor or subcontractor furnishing labor entitling him to lien may include in the price of such labor, the amount paid by him for the board of the men employed, if he is required to pay the board of the men as a part of their wages. Lybrandt v. Eberly, 36 Pa. St. 347.

4. Scannell v. Hub Brewing Co., 178 Mass. 288, 59 N. E. 628; Howes v. Reliance Co., 46 Minn. 44, 48 N. W. 448; Parrish's Appeal, 83 Pa. St. 111; Sweet v. James, 2 R. I. 270; Wilkinson on Mechanics' Liens, p. 14; Boisot on Mechanics' Liens, §98; Rockel on Mechanics' Liens, §17. A lien may sometimes be established for work done away from the premises, if it be done upon articles which are intended for use in the building, and are actually used in its construction or repair. In such case the labor is to all intents and purposes performed in the erection, alteration or repair of a building within the terms of the statute. Where, for instance, the inside finish for a house is sawed, planed, or moulded at a mill, or the doors or windows are made at a carpenter shop, or the iron-work is prepared at a blacksmith's shop, away from the premises, but really as a part of the work of construction, and the material upon which such work is done actually becomes a part of the building, a lien arises for such labor equally with the labor performed upon the land on which the house is erected. But it is essential that such labor be performed under an agreement that the articles upon which the work is done are to be used in the construction of the building against which it is sought to enforce the lien. Jones on Liens, 3rd Ed. §1324.

for inclusion in the lien,[5] though the better rule would appear to be that no lien should be allowed therefor except as the amount thereof is included in the contract price of the labor or materials furnished.[6] The services of an architect in preparing plans and specifications and superintending the work of construction will furnish the basis for lien, but services in merely furnishing plans and specifications have been held insufficient for that purpose.[7] Trivial services in remedying minor defects, rendered some time after the date of real completion of the contract, upon the claimant's own initiative, will ordinarily not give rise to the right of lien.[8]

§ 20. Materials For Which Lien May Be Claimed.

The statute enumerates the specific undertakings for which lien will lie, and the furnishing of materials as well as labor for any of the enumerated undertakings will give rise to a right of lien.[9] Where the improvement is in connection with a building, improvements connected with but outside of the building, as drain pipes, water systems, cisterns and the like, poles, wiring and piping appurtenant to the plants of electric or water companies, dams and flumes as parts of mills, and windmills in certain cases, have been held to furnish the basis for lien.[10] The right to lien is given on the theory that the value of the property to which the labor or materials have been applied has been increased, hence if materials are furnished for a structure or are delivered upon the premises but are not actually used or in-

5. 27 Cyc. 44; Wilkinson on Mechanics' Liens, p. 13; Boisot on Mechanics' Liens, §112; Rockel on Mechanics' Liens, §17.

6. See Jones on Liens, 3rd Ed. §1356; Boisot on Mechanics' Liens, §112; Gardner v. LeFevre, 180 Mich. 219 (222), 146 N. W. 653.

7. See Johnson v. O'Neill, 181 Mich. 326, 148 N. W. 364, 150 N. W. 835; also 27 Cyc. 42, 43; Boisot on Mechanics' Liens, §116; Phillips on Mechanics' Liens, 3rd Ed. §158; Rockel on Mechanics' Liens, §16; Jones on Liens, 3rd Ed. §1367.

8. See cases cited in note 13, §54 herein; 12 L. R. A. (N. S.) 864 note; Houck on Law of Mechanics' Liens, §165.

9. See §1 of the Act; C. L. 1915 (14796), How. 2nd. Ed. §13766, C. L. 1897 (10710).

10. Boisot on Mechanics' Liens, §§107, 109; Rockel on Mechanics' Liens, §15; see note, 42 L. R. A. (N. S.) 354-359.

corporated in the building, no lien can ordinarily result.[11] The furnishing of materials used in a work of construction or improvement but not incorporated in the building, as tools, scaffolding, etc., has been held not to give rise to a right of lien.[12] The furnishing of money to pay for labor or materials used constitutes no ground for lien,[13] nor may lien be claimed for damages sustained by the contractor or subcontractor, though due to the owner's fault.[14] Materials furnished away from the building or premises have been held a proper basis for lien.[15] The place of furnishing is apparently not material, if the materials furnished are actually used in the structure.[16] The installing of machinery or

11. This is the rule in Michigan and many other jurisdictions. Smalley v. Gearing, 121 Mich. 190 (203), 79 N. W. 1114, 80 N. W. 797; North v. Globe Fence Co., 144 Mich. 557 (558-559), 108 N. W. 285; Rockel on Mechanics' Liens, §19; Boisot on Mechanics' Liens, §119 note; Jones on Liens, 3rd Ed. §1328; Phillips on Mechanics' Liens, 3rd Ed. §159, Contra, see Jones on Liens, 3rd Ed. §1329; Boisot on Mechanics' Liens, §119 note. See notes, 31 L. R. A. (N. S.) 746-758; 36 Id. 871. However, in case the failure to use such material was due to the owner's fault, as by his entrance into bankruptcy, or allowing his property to pass into the hands of a receiver or diverting the material to some other use, the right to lien has been held not defeated. Chicago Artesian Well Co. v. Carey, 60 Ill. 73 (77); City of Salem v. Lane & Bodley Co., 189 Ill. 593 (602-603), 60 N. E. 37; Sears v. Wise, 64 N. Y. S. 1063 (1064-1065); Beckel v. Petticrew, 6 Ohio St. 247, (251); Totten & Hogg Co. v. Muncie Nail Co., 148 Ind. 372 (375-376), 47 N. E. 703; Burns v. Sewell, 48 Minn. 425 (427), 51 N. W. 224; Esslinger v. Huebner, 22 Wis. 602 (603-604); Trammell & Co. v. Mount, 68 Texas 210 (213), 4 S. W. 377; Rockel on Mechanics' Liens, §19; Jones on Liens, 3rd Ed. §1334; Phillips on Mechanics' Liens, 3rd Ed. §159. But in Esslinger v. Huebner, above, the court said: "Undoubtedly questions of equity might arise between different materialmen, where both had sold on the credit of the building, the materials of one being used in its erection, and those of the other not, which might require the interposition of a court of equity."

12. Rockel on Mechanics' Liens, §18; Boisot on Mechanics' Liens, §123; Jones on Liens, 3rd Ed. §1352; Phillips on Mechanics' Liens, 3rd Ed. §159; Ray on Mechanics' Liens (1916) §155. See also, upon the right to claim lien for materials used but not incorporated in the structure: 13 Am. & Eng. Ann. Cas. 13-17; 18 Id. 588; 27 Id. 502-508; note, 23 Id. 227-229; 36 L. R. A. (N. S.) 866-870.

13. Boisot on Mechanics' Liens, §114; Phillips on Mechanics' Liens, 3rd Ed. §159a; Jones on Liens, 3rd Ed. §1359; Rockel on Mechanics' Liens, §20.

14. 27 Cyc. 52.

15. Boisot on Mechanics' Liens, §118. See note 4, §19 herein.

16. Great Western Mfg. Co. v. Hunter, 15 Neb. 32, 16 N. W. 759; Parker Land Co. v. Reddick, 18

putting in of fixtures designed to be permanently attached to the building will furnish the basis for lien;[17] but the furnishing of portable machinery or temporary fixtures which may be moved from place to place has been held insufficient therefor.[18] The furnishing of defective material unsuitable for the purposes designed will give no right to lien, but a substantial compliance with the requirements or specifications as to materials furnished will be sufficient to give rise to a right of lien.[19] The mere furnishing of material or labor which is used in a building or structure and for which lien might be claimed will not always be a sufficient basis for a lien. The intent with which the materials are furnished is an important factor; in general the materials must be furnished with the intent that they

Ind. App. 616, 47 N. E. 848; Badger Lumber Co. v. Mayes, 38 Neb. 822, 57 N. W. 519; Mallory v. La Crosse Abattoir Co., 80 Wis. 170, 49 N. W. 1071. Contra: Birmingham Iron Foundry Co. v. Glen Cove Starch Co., 78 N. Y. 30. See Campbell v. Coon, 49 N. Y. 556, 44 N. E. 300, 38 L. R. A. 410, note, upon performance in one state of contract made in another.

17. Albert Gall Co. v. Dowagiac Gas Co., 160 Mich. 255 (257), 125 N. W. 283. In this case plaintiff decorated defendant's office, furnishing material, part of which was permanently attached to the building and part of which, as window shades, window seats, pedestals, etc., remained movable. It was held that where the payments upon the contract already made by defendant would much more than pay for what was clearly shown to be personal property, a lien would lie for the balance unpaid. See also: Boisot on Mechanics' Liens, §§95, 100, 101, 213; Phillips on Mechanics' Liens, 3rd Ed. §162a, 175, 177-178; Jones on Liens, 3rd Ed. §1335; Rockel on Mechanics' Liens, §14. The Michigan statute expressly includes the installation of machinery. §1 of the Act, C. L. 1915 (14796), How. 2nd Ed. §13766, C. L. 1897 (10710.)

18. Boisot on Mechanics' Liens, §§95-96, 100-101, 105, 214; Jones on Liens, 3rd Ed. §§1335-1336, 1341; Rockel on Mechanics' Liens, §14; Phillips on Mechanics' Liens, 3rd Ed. §§162, 177-178. Trade fixtures would seem to constitute a general exception to this rule, in that, although removable by the tenant, as between him and his landlord, they are subject to the claim of lien of the mechanic as between him and the owner. Halley v. Alloway, 78 Tenn. 523; Waycross Opera House Co. v. Sossman, 94 Ga. 100, 20 S. E. 252. No lien can be claimed for machinery furnished for the manufacture of materials used in the building or structure. Jones on Liens, 3rd Ed. §1337.

19. Gier v. Daiber, 148 Mich. 190 (193-194), 111 N. W. 773; Boisot on Mechanics' Liens, §122; Jones on Liens, 3rd Ed. §1342; Rockel on Mechanics' Liens, §20; Phillips on Mechanics' Liens, 3rd Ed. §161; 27 Cyc. 47.

shall be used in the particular building or improvement in order to subject such building or improvement to a lien therefor.[20] It has been held that no lien can be claimed for materials furnished where the furnisher or seller did not know they were to be used in the particular building or improvement, or sold such materials solely on the personal credit of the purchaser, or on a general sale or account without any knowledge or understanding as to where they were to be used or what was to be done with them.[21] One furnishing materials to complete a structure under a contract with a person having no title to the land upon which it was situated was held not entitled to a lien on the building alone under section 3 of the act.[22] One furnishing extras for a building upon the verbal demand of the owner was held to be entitled to no lien therefor where the contract

20. Rockel on Mechanics' Liens, §§21-22; Boisot on Mechanics' Liens, §120; Jones on Liens, 3rd Ed. §1324.

21. Van Cleve Glass Co. v. Erratt, 110 Mich. 689, 68 N. W. 978; Willard v. Magoon, 30 Mich. 273 (279-280); Stout v. Sawyer, 37 Mich. 313 (315); People v. McAllister, 49 Mich. 12, 12 N. W. 891; Jones on Liens, 3rd Ed. §§1325-1327, 1330-1333; Boisot on Mechanics' Liens, §§120-121; Rockel on Mechanics' Liens, §§21-22. In Stout v. Sawyer, cited above, a firm in Ohio had sold and shipped some machinery to defendant in Michigan, with no understanding as to its installation upon any particular property. Lien later claimed was denied, the Court saying (p. 315): "The lien for articles which form no part of the structure, and which may be removed from one place to another, is not given to any person who does not himself put them into the building, and thus connect his own labor with the premises sought to be charged. What he does must be done within the State and on the premises. It is not within the terms or the design of the statute to create a lien in favor of parties who merely sell machinery which may or may not go into a building in this State according as the purchaser determines. The lien is given for something actually done to improve the premises, and not for chattels which it is supposed may be placed there by some one else. There is no more reason for giving a lien for engines and machinery sold separately as such, than for carpets or furniture or ornaments thus sold and intended to be placed in the house. If the engine is put into the building by the contractor, and becomes a fixture, he has done something towards completing the mill; but where he has merely sold it and the purchaser may do what he chooses with it, the vendor is in no sense a builder, repairer or fitter up of the building, and has done nothing whatever to the freehold."

22. Fuller v. Loan & Building Association, 119 Mich. 71 (74), 77 N. W. 642.

provided against claims for extras unless agreed upon in writing.[23]

23. Gier v. Daiber, 148 Mich. 190 (194-195), 111 N. W. 773.

CHAPTER IV.

PERSONS ENTITLED TO CLAIM LIEN.*

§ 21. Persons Entitled to Claim Lien—In General.
22. Owners of Claims Not Due.
23. Assignees.
24. Contractors.
25. Subcontractors, Materialmen and Laborers.
26. Other Persons.

§ 21. Persons Entitled to Claim Lien—In General.

The statute permits all furnishers of material or performers of labor, under any contract with or on behalf of the owner, part owner or lessee of any interest in real estate, to claim a lien upon the land and structure, and where the contract is with one having no title to the land, to claim a lien upon the new structure erected thereon. The statute provisions in this regard are in substance: Every person who shall, in pursuance of any contract, express or implied, written or unwritten, existing between himself as contractor, and the owner, part owner or lessee of any interest in real estate, build, alter, improve, repair, erect, ornament, or put in, or who shall furnish any labor or materials in or for building, altering, improving, repairing, erecting, ornamenting or putting in any house, building, machinery, wharf, or structure or shall build or repair any sidewalks, or shall furnish any materials therefor, and every person who shall as subcontractor, laborer or material man, perform any labor or furnish materials to such original or principal contractor, or any subcontractor, in carrying forward or completing any such contract, shall have a lien

*In general as to the subjects comprehended in Chapter IV see Title "Mechanics' Liens," 34 Cent. Dig. §§112-159, and 13 Dec. Dig. §§79-109.

therefor.[1] Any person furnishing services and materials for the erection of a new building or structure upon land to which the person contracting for such erection has no legal title, shall have a lien therefor upon such building or structure, and the forfeiture or surrender of any title or claim of title held by such contracting person to such land shall not defeat the lien upon such building or structure of such person furnishing services or materials.[2]

§ 22. Owners of Claims Not Due.

It is not essential that the owner of a claim not yet due, await the time when his claim shall become due before taking proceedings to perfect or to enforce a lien, or suffer the loss of his right to a lien by reason of the deferred date at which his claim matures; he may take immediate proceedings to give notice of, and to preserve, his rights in order that provision may be made, by the reservation of assets, to liquidate his claim when it does mature. The substantial requirements of the statute in this particular are that parties entitled to liens whose claims are not due and payable, may give notice of their intent to claim liens and may become parties to suits to enforce liens, or institute such suits or proceedings themselves, and their claims shall be allowed subject to a reduction of interest, if such claims are not due at the time of the rendition of the decree, but no process shall issue or proceedings be had to enforce a decree for such claims until they mature.[3]

§ 23. Assignees.

As the claim of the furnisher of material or labor or of

1. Sec. 1 of Act 179 of 1891, C. L. 1915 (14796), How. 2nd Ed. §13766, C. L. 1897 (10710); 27 Cyc. 81-84; Wilkinson on Mechanics' Liens, pp. 8-9.

2. Sec. 3 of Act 179 of 1891, C. L. 1915 (14798), How. 2nd Ed. §13768, C. L. 1897 (10712); see also §12 herein.

3. §26 of Act 179 of 1891, C. L. 1915 (14821), How. 2nd Ed. §13791, C. L. 1897 (10735). See Smalley v. Ashland Brown-Stone Co., 114 Mich. 104 (106), 72 N. W. 29.

a subcontractor may be assigned either before or after perfection of a lien, it follows as a necessary sequence that the assignee of such a claim acquires the same right as was possessed by his assignor to enforce collection, and he is equally entitled to claim a lien and to proceed to its enforcement.[4]

§ 24. Contractors.

The contractor who performs his contract and complies with the necessary prerequisites or conditions precedent is entitled to claim lien, unless in the contract he has granted away that right or has by some act or omission waived the right or has become estopped to assert it.[5] The contractor's lien may include the amounts due from him to his subcontractors, laborers and materialmen, though where the latter

4. §25 of Act 179 of 1891, C. L. 1915 (14820), How. 2nd Ed. §13790, C. L. 1897 (10734), 27 Cyc. 255-261; Wilkinson on Mechanics' Liens, pp. 9-10.

5. 27 Cyc. 83; Wilkinson on Mechanics' Liens, pp. 8-11. Upon distinction between contractor and subcontractor, see 27 Cyc. 92-93. A contractor under proper circumstances who furnishes materials may be considered to be a materialman. Smalley v. Gearing, 121 Mich. 190 (200), 79 N. W. 1114, 80 N. W. 797. A plumber and gas fitter furnishing material and labor for plumbing, roofing, heating and wiring a building, "in pursuance of a certain contract" with the owner as stated in his claim of lien, was held a contractor rather than a materialman, though no aggregate price for the work and material was agreed upon. Sterner v. Haas, 108 Mich. 488, 66 N. W. 348. Where a company contracted with the defendant to furnish the latter a steel gas-holding tank "all delivered and erected on foundation" provided by defendant, to be paid for part on delivery of material, part during erection, and balance on completion, so that by the terms of the contract, labor was to be performed on the premises, and such labor was in fact performed after the last of the material had been furnished, such company was held a contractor and not a materialman. Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111 (114), 82 N. W. 801. Where a mortgagor deeded his property to the mortgagee, a building and loan association, taking back a land contract for a consideration representing the amount of the mortgage and a further sum which the association agreed to furnish him to complete a building already in process of erection on the premises, such mortgagor-vendee does not stand in the position of a contractor and such association (mortgagee-vendor) does not stand in the position of owner, so as to entitle one furnishing labor and material at such mortgagor-vendee's request to a lien. Fuller v. Detroit Loan & Building Ass'n,

file liens, that would diminish the contractor's lien *pro tanto*.[6]

§ 25. Subcontractors, Materialmen and Laborers.

All subcontractors, materialmen and laborers,[7] who perform service or labor or who furnish materials are entitled to the protection of the statute. This is a protection which may not be waived for them by the contractor. The question of who is a subcontractor or materialman, as distinguished from a contractor, often becomes material, as certain prerequisites to the obtaining and enforcement of a lien exist in cases of contractors which do not exist in cases of subcontractors and others.[8] The lien is a direct one in behalf of the persons entitled to it and not by subrogation to the rights of the original contractor, and the claimant is not bound by any stipulation as to the acquisition of lien or waiving the right to lien contained in the original contract to which he is not a party, except as to the contract price.[9] The word "materialman" as used in the law, is construed to include all persons by whom any materials are furnished in or for building, altering, improving, repairing, erecting, or ornamenting, or putting in any house, building, machinery, wharf or other structure or walk or walks.[10]

119 Mich. 71 (73), 77 N. W. 642.

6. Halpin v. Garman, 192 Mich. 71, 158 N. W. 29, 23 D. L. N. 421-422; 27 Cyc. 84.

7. See 27 Cyc. 81-83, 96-100; 49 L. R. A. 255. Subcontractors and materialmen and their rights to lien in general. Jones on Liens, 3rd Ed. §§1283-1309; Rockel on Mechanics' Liens, §§53-70; Boisot on Mechanics' Liens, §§198-199; Phillips on Mechanics' Liens, 3rd Ed. §§44-52, 57-65b, 243-247; Houck on Law of Liens, §§96-129; Overton on Liens, §§551-553. In Michigan the subcontractor or materialman regardless of degree is entitled to lien. See 27 Cyc. 98-100. Every person under the contractor performing any fixed part of the contract is a subcontractor in the absence of statutory definition. Jones on Liens, 3rd Ed. §1283. Who is a laborer within a statute giving right to lien. Notes, 27 Am. & Eng. Ann. Cas. 138-141; 18 L. R. A. 305.

8. For cases bearing upon the distinction between contractors and subcontractors, laborers and materialmen, see §5 herein.

9. Vaughan v. Ford, 162 Mich. 37 (45), 127 N. W. 280; Smalley v. Gearing, 121 Mich. 198, 79 N. W. 1114, 80 N. W. 797; 27 Cyc. 84-85.

10. §29 of Act 179 of 1891, C. L. 1915 (14824), How. 2nd Ed. §13794, C. L. 1897 (10738). See cases where parties have been held to be materialmen, §5 herein.

The word "laborer" is construed to include any mechanic, workman, artisan or laborer, employed in or about any such work as hereinbefore specified.[11] In the distribution of payments a contractor furnishing materials was held to be a materialman,[12] and manufacturers selling materials made in their own shops were held materialmen.[13] One agreeing with a contractor to manufacture and furnish cement blocks, using the contractor's machine to make them and delivering them ready for use where required but without undertaking to perform a part of the original contract, was held a materialman.[14] One furnishing lockers for use under a contract which was indefinite and lacking in detail, but substituting his own definite proposition for the lockers furnished, which offer was accepted and the goods furnished in accordance therewith, was regarded as a materialman;[15] but one furnishing material and labor for plumbing, roofing, heating and wiring a building, though no aggregate price was agreed upon, was held to be a contractor.[16]

§ 26. Other Persons.

All others than those within the designations above given, who furnish material or perform service pursuant to or in execution of the contract are entitled to liens. This would permit the acquisition of lien by architects in certain cases[17] and possibly by those transporting materials to the

11. §29 of Act 179 of 1891, C. L. 1915 (14824), How. 2nd Ed. §13794, C. L. 1897 (10738). See §5 herein.

12. Smalley v. Gearing, 121 Mich. 190 (200), 79 N. W. 1114, 80 N. W. 797.

13. Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111, 82 N. W. 801.

14. Kuenzel v. National Construction Co., 159 Mich. 133, (135), 123 N. W. 801.

15. People v Title Guaranty & Trust Co., 154 Mich. 614, 118 N. W. 586.

16. Sterner v. Haas, 108 Mich. 488, 66 N. W. 348. See §5 herein, also McMonegal v. Wilson, 103 Mich. 264 (266), 61 N. W. 495.

17. Johnson v. O'Neill, 181 Mich. 326, 148 N. W. 364, 150 N. W. 835. As a general rule the architect who prepares the plans and specifications and superintends the construction of the work is entitled to a lien, but simply providing the plans and specifications has been held not sufficient. Rockel on Mechanics' Liens, §16; Boisot on Mechanics' Liens, §116; Phillips on Mechanics' Liens, §158; Jones on Liens, 3rd Ed. §1367.

point of use, though it is doubtful whether other freight transportation charges could be added except as a part of the claim of some contractor, subcontractor or materialman.[18]

18. See §19, note 51 and authorities cited thereunder.

CHAPTER V.

CONTRACTS UNDER WHICH LIENS PERMITTED, AND CHARACTER AND EXTENT OF LIENS PERMITTED THEREUNDER.*

§ 27. In General.
28. Formalities Required in Making Contract.
29. The Contract as Limiting the Extent of Lien.
30. Contract Provision Against Liens.
31. The Absence of Express Contract Provisions Extending to All Conditions.
32. Lien for Additional Work and for Extras.
33. Notice of Furnishing Under Section 1 of the Lien Law.
34. Defective Performance or Delay, Rights Upon.
35. Defective Performance or Delay; Recoupment of Damages therefor by Owner.
36. Acceptance by the Owner.
37. Abandonment or Failure to Perform by Contractor.
38. Abandonment by Owner or Failure to Perform, Rights Upon.

§ 27. In General.

A mechanic's lien or a right to a lien cannot arise in the absence of a contract, express or implied, to which the owner of the interest in the property sought to be reached is a party.[1] Liens upon new structures may, however, be

*In general as to the subjects comprehended in Chapter V, see Title "Mechanics' Liens," 34 Cent. Dig. §§60-111, 143-147 and 13 Dec. Dig. §§55-78, 111.

1. §1 of Act 179 of 1891 as amended by Act 199 of 1893, Act 143 of 1897, Act 17 of 1903 and Act 121 of 1909, C. L. 1915 (14796), How. 2nd Ed. §13766, C. L. 1897 (10710), Merrill v. Brant, 175 Mich. 182 (184), 141 N. W. 550; Clark v. Raymond, 27 Mich. 456 (459); Willard v. Magoon, 30 Mich. 279; Scales v. Griffin, 2 Doug. 54 (66); John Wallace Sons Co. v. Wilkinson, 181 Mich. 693 (695-699), 148 N. W. 166; 27 Cyc. 50-51; Holland Furnace Co. v. Hartig, 181 Mich. 342

created where the contractee has no title to the land.[2] The owner must have capacity to contract or there can be no lien.[3] The contract must relate to land and must be performed upon land within the state;[4] it should identify the real estate upon which the structure is to be erected or the improvement made, and failure to do so may be fatal to any claim of lien upon the land.[5] A single contract for the

(344, 346), 148 N. W. 169. Although the question of homestead arose in this case, nevertheless the decision therein would appear to be based on the fact that the husband, the owner of the land, was not a party to the contract. But a wife's land will be subjected to lien where the contract for the building was made with her husband and in his name only, if the evidence shows that he was at the time acting as her agent only, that she wanted the buildings built and knew they were being erected upon her land, used funds of her own and borrowed more to pay upon the contract, and drew her own personal checks to claimant and other contractors. Frohlich v. Carroll, 127 Mich. 561 (564-565), 86 N. W. 1034. For description of term "owner" see 27 Cyc. 52-53. There must be a contract by the owner for or consent to the construction giving rise to the right of lien. This may be written or verbal, express or implied or personal or through representatives but that it exists in some form is indispensable. Jones on Liens, 3rd Ed. §§1234, 1238, 1251, 1253-1256; Rockel on Mechanics' Liens, §§24-39; Boisot on Mechanics' Liens, §§18-21, 66-75; Phillips on Mechanics' Liens, 3rd Ed. §§112 et seq.; Houck Law of Liens, §135; Kneeland on Mechanics' Liens, 2nd Ed. §§48-70; Overton on Liens, §538. The lien, however, is created not by the contract but by the furnishing pursuant to contract. Jones on Liens, 3rd Ed. §1235; Boisot on Mechanics' Liens, §65; Phillips on Mechanics' Liens, §112.

2. §3 of the Act 179 of 1891, C. L. 1915 (14798), How. 2nd Ed. §13768, C. L. 1897 (10712).

3. Jones on Liens, 3rd Ed. §1243; Rockel on Mechanics' Liens, §29; Kneeland on Mechanics' Liens, 2nd Ed. §13. So an infant's contract cannot give rise to a valid lien. Jones on Liens, 3rd Ed. §1239; Boisot on Mechanics' Liens, §282; Phillips on Mechanics' Liens, 3rd Ed. §§108-109; Houck's Law of Liens, §81; 27 Cyc. 65; Wilkinson on Mechanics' Liens, p. 29. So held in many cases where guardian without specific authority made the contract. Jones on Liens, 3rd Ed. §1239; Boisot on Mechanics' Liens, §283; Phillips on Mechanics' Liens, 3rd Ed. §111; Kneeland on Mechanics' Liens, §§26-30; 15 Am. & Eng. Ann. Cas. 1089.

4. Stout v. Sawyer, 37 Mich. 313. The contract in this case contained a written order to claimants in another state requesting them to ship certain personal property (machinery) to defendant in Michigan, signed by the parties, and claimants merely shipped the machinery to defendant, having at the time no knowledge or understanding as to any particular property on which it was to be installed. It was held no lien could be claimed in such case. See also: People v. McAllister, 49 Mich. 12, 12 N. W. 891.

5. Hammond v. Wells, 45 Mich. 11 (12-13), 7 N. W. 218; see 27 Cyc. 68-69. Where the contract described the premises merely as ground situated in a certain village, this was held sufficient where

erection of several houses on specified lots to be completed at a specified time for a fixed price for each has been held a separable contract.[6]

§ 28. Formalities Required in Making Contract.[7]

Except in the specific cases heretofore discussed[8] the contract may be written or unwritten, express or implied.[9] When land is owned by a husband and wife by entireties, or when land is held and occupied as a homestead, a contract for a building or improvements thereon is required to be in writing and to be signed by both the husband and wife, in order that a lien may attach to either the land or the building.[10] Under section 2 of the present act as originally enacted[11] a lien might attach to land held by the entireties and to the improvements made thereon, whether the contract for the same was in writing and signed or not, if it were made with both husband and wife or with either of them by and with the knowledge and consent of the other; but this section was amended by Act 143 of 1897 to constitute the law as it now stands,[12] requiring a written contract signed by both.

the building was constructed upon the only land owned by the parties in such village; Jossman v. Rice, 121 Mich. 270 (273-274), 80 N. W. 25.

6. Barnard v. McLeod, 114 Mich. 73, 72 N. W. 24; 27 Cyc. 48; Wilkinson on Mechanics' Liens, pp. 19-20.

7. 27 Cyc. 66-81.

8. See §§13-18.

9. §1 of Act 179 of 1891 as amended by Act 199 of 1893, Act 143 of 1897, Act 17 of 1903, and Act 121 of 1909, C. L. 1915 (14796), How. 2nd Ed. §13766, C. L. 1897 (10710); Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578 (579), 132 N. W. 117.

10. §2 of Act 179 of 1891 as amended by Act 143 of 1897, C. L. 1915 (14797), How. 2nd Ed. §13767, C. L. 1897 (10711). See §§13-15, Homesteads, also §§16-17, Estates by Entireties, and cases there cited.

11. Act 179 of 1891, the section in question originally read: " * * * And in case the title to such lands upon which improvements are made is held by husband and wife jointly, the lien given by this act shall attach to such lands and improvements, if the improvements be made in pursuance of a contract with both of them, or in pursuance of a contract with one of them by and with the knowledge and consent of the other."

12. The present law (section 2 of Act 143 of 1897) now reads as follows: "In case the title to such lands upon which improvements are made is held by husband and wife jointly, or in case the lands upon which such improvements are made are held and

§ 29. The Contract as Limiting the Extent of Lien.

In general the statutory rule is that the owner, part owner or lessee shall not be liable to subcontractors, materialmen or laborers for any greater amount than he contracted to pay to the original contractor,[13] nor for such amount to be paid out in a different manner than prescribed by the contract,[14] nor for labor performed or ma-

occupied as a homestead, the lien given by this act shall attach to such lands and improvements if the improvements be made in pursuance of a contract in writing signed by both the husband and wife."

13. §1 of Act 179 of 1891 as amended by Act 199 of 1893, Act 143 of 1897, Act 17 of 1903 and Act 121 of 1909, C. L. 1915 (14796), How. 2nd Ed. §13766, C. L. 1897 (10710); 27 Cyc. 212-214; Smalley v. Gearing, 121 Mich. 190 (194, 199), 79 N. W. 1114, 80 N. W. 797. The statute (§1) limits the amount of the liens of subcontractors, etc., to the amount legally due under the original contract, after deducting from the contract, among other items of credit, such damages as may be awarded to the owner "by reason of any failure or omission in the performance of such contract." Vaughan v. Ford, 162 Mich. 37 (46), 127 N. W. 280; Greilick Co. v. Rogers, 144 Mich. 313, 107 N. W. 885. The lien is dependent upon the performance of the contract with the owner. Phillips on Mechanics' Liens, 3rd Ed. §§132-152, 204-214. Kneeland on Mechanics' Liens, 2nd Ed. §§128-133a; Overton on Liens, §§563-564. Recovery can be had on any lien only to the extent of the amounts fixed by contract and the owner is entitled to credit for failure of complete or sufficient performance. Boisot on Mechanics' Liens, §§79-87.

The owner's defense, as against lien claimants, that he had already paid out more than the contract price, was held of no avail where,—although some extra work and materials had been furnished and the contract provided that the owner might make alterations in the original plans, increasing or diminishing the contract price accordingly,—there was no evidence (1) that such amount was paid in pursuance of the contract, (2) what the contract price, as finally adjusted, amounted to, or (3) of any large variations from the original contract carried out, or (4) even if over payments were made, that the contractor distributed such payments ratably among the subcontractors, materialmen and laborers. Hannah & Lay Co. v. Hartzell, 125 Mich. 177 (180), 84 N. W. 52. Under section 3 of the former law (Act 258 of 1879 as amended by Act 216 of 1885), a claimant could not claim a lien for an amount beyond the sum due at the time of filing and serving the same or which might thereafter become due from such owner. Bourget v. Donaldson, 83 Mich. 478 (485), 47 N. W. 326. This is now changed in accordance with §1 of the present law.

14. 27 Cyc. 94. Where pursuant to contract the contractor takes a note for part of the contract price, a subcontractor is entitled to lien for cash only to the extent of the remainder. Jones Lumber Co. v. Murphy, 64 Iowa, 165, 19 N. W. 898.

terials furnished not in accordance with the contract.[15] Modifications of the contract between the owner and the original contractor, after subcontractors, materialmen or laborers have entered upon their work, cannot affect their rights to liens unless they consent.[16]

§ 30. Contract Provision Against Liens.

The provision of the statute[17] does not, however, admit of contracts which waive the lien statute as applied to those not parties to the contract, and the courts have expressly held that no contractor can, by any contract provision to the effect that the building shall be delivered free from liens, preclude subcontractors, materialmen or laborers otherwise entitled to claim liens from acquiring liens[18] and that, as the statute provides for direct liens in behalf of the persons entitled thereto and not by subrogation to the rights of contractors, subcontractors and other claimants are not bound by the stipulations of the original contract as to liens except as to the contract price.[19]

§ 31. The Absence of Express Contract Provisions Extending to All Conditions.

The contract need not be a single or indivisible one covering all of the details of the construction; it may be made up of a series of agreements or writings or orders or acceptances of materials, labor or construction; and if

15. 27 Cyc. 88-89.

16. 27 Cyc. 100. Minor changes from the original contract, as are frequently made by an owner during the construction of a building, do not constitute such a waiver of the contract as will exclude its terms in determining the owner's liability under this section (§1) of the law. Delray Lumber Co. v. Keohane, 132 Mich. 17 (21), 92 N. W. 489.

17. §1 of Act 179 of 1891 as amended, C. L. 1915 (14796), How. 2nd Ed. §13766, C. L. 1897 (10710).

18. Smalley v. Gearing, 121 Mich. 190 (198), 79 N. W. 1114, 80 N. W. 797. See 27 Cyc. (94-96), 84-85.

19. Vaughan v. Ford, 162 Mich. 37 (45), 127 N. W. 280. Effect of stipulation against liens in contractor's agreement with owner. Notes, 14 Am. & Eng. Ann. Cas. 144-147; I Id. 954-955; 50 L. R. A. (N. S.) 153-166.

the construction or furnishing is with the approval of, or is accepted by, the owner, part owner or lessee, it will sufficiently form the basis of a lien, as in such cases the implications would create implied contracts. Where damages are claimed by the owner for defective workmanship, the contractor may defend by showing that the defects were caused by the omission of a duty resting upon the owner, in the absence of a provision concerning such duty in the contract.[20]

§ 32. Lien for Additional Work and for Extras.

Extras in addition to the requirements of the original contract, for which the owner agrees to pay, or with regard to which a promise to pay arises by implication, may be included in the lien.[21] Where the contract provided that there should be no charge for extras unless agreed to in writing, this was held to preclude the inclusion in a lien of extras furnished upon a verbal demand;[22] though where the lien claimed included extras which the specifications required should be ordered only in writing, the claim that they were not so ordered, first made in the Supreme Court, is insufficient to defeat the lien;[23] and where the contract provided that the value of extras should be fixed by arbitration or agreement, liens therefor were held unenforceable until the value of the extras was so fixed.[24] Additional

20. Johnson v. O'Neill, 181 Mich. 326 (329), 148 N. W. 364, 150 N. W. 835. See §35, note 35.

21. Vaughan v. Ford, 162 Mich. 37 (43, 44); Johnson v. O'Neill, 181 Mich. 326, 148 N. W. 364, 150 N. W. 835; 27 Cyc. 51-52; Wilkinson on Mechanics' Liens, pp. 16-17. See Hannah & Lay Co. v. Hartzell, 125 Mich. 177 (180), 84 N. W. 52; Landyskowski v. Martyn, 93 Mich. 575, 53 N. W. 781.

22. Gier v. Daiber, 148 Mich. 190 (194-195), 111 N. W. 773. So held even though the cost of such extras would be a proper measure of damage for breach of contract in case the contractor was ordered to abandon the work, and the contractor testified that the owner demanded such extras as a matter of right and told claimant he could supply them or abandon the contract.

23. Halpin v. Garman, 192 Mich. 71, 23 D. L. N. 421 (432), 158 N. W. 29.

24. Boots v. Steinberg, 100 Mich. 134 (139-140), 58 N. W. 657.

work and expense by the contractor in performing some duty incumbent upon the owner, in the absence of an express understanding as to the same may be included in the lien; likewise, when covered by the specifications.[25] And the contractor may recover for extras of this nature wrongfully charged to him although he did not formally ask credit for such items.[26] Where the owner made changes in the plans of an office building so as to make it contain more stores than the contract under the original plan called for, such changes were properly treated as extras, for which the claimant, the architect, could recover additional compensation.[27] Where claimant was compelled to use a substantially larger amount of material in a substituted plan than originally planned upon, and where he went to extra trouble and expense in pumping out water which had flooded a basement as a result of the acts of the contractor and the acts of an independent contractor under the orders of such contractor, he may include such extras in his lien.[28]

§ 33. Notice of Furnishing Under Section 1 of the Lien Law.

To ——.

Take notice, that the undersigned is furnishing to —— certain —— to wit —— for —— a certain —— situated on the following described property, viz.: ——.

Dated at ——, on this ——day of ——, A. D. 19—.

25. Malcomson - Houghton Co. v. Gregorian Building Co., 191 Mich. 678, 23 D. L. N. 405 (408), 158 N. W. 126; Johnson v. O'Neill, 181 Mich. 326, 148 N. W. 364, 150 N. W. 835.

26. Malcolmson-Houghton Co. v. Gregorian Building Co., 23 D. L. N. 405 (408), 158 N. W. 126.

27. Johnson v. O'Neill, 181 Mich. 326 (328), 148 N. W. 364, 150 N. W. 835. Where changed plans were agreed upon after bids were received on the original plans but before the contract was let the architect's services in preparing them were properly allowed as extras, whether such changes were ordered and made after such bids were received or after the contract was let. Id. pp. 331-332.

28. Vaughan v. Ford, 162 Mich. 37 (41-44), 127 N. W. 280.

§ 34. Defective Performance or Delay, Rights Upon.

In general the right to lien is predicated upon the contract and full performance in accordance therewith,[29] though where there is a good faith attempt to comply with the contract, a lien will not be denied for minor defects in material or workmanship the existence of which do not indicate a purpose to defraud, which might have been overlooked, and which might have been remedied if attention had been directed to them.[30] Where the construction is not in accordance with the contract and the noncompliance furnishes a materially different structure than that called for by the contract, neither the contractor nor the subcontractor participating in the violation of the contract can successfully claim lien, even though the architect furnished a certificate of completion.[31]

§ 35. Defective Performance or Delay; Recoupment of Damages therefor by Owner.

For any failure or omission in the performance of the contract, as for undue delay or defective materials or workmanship, the statute provides that the owner, part owner or lessee shall be entitled to recoup his damages.[32] But he cannot recover under a plea of set-off or recoupment, for

29. Substantial performance under the contract is, however, generally sufficient. McMonegal v. Wilson, 103 Mich. 264 (266, 268), 61 N. W. 495; Jossman v. Rice, 121 Mich. 270 (273-274), 80 N. W. 25; Johnson v. O'Neill, 181 Mich. 326 (331), 148 N. W. 364, 150 N. W. 835. Where the contract provided that the building should be constructed to the satisfaction of the owner, failure to so complete it will preclude a lien unless the owner accepts the work as satisfactory. Boots v. Steinberg, 100 Mich. 134 (139), 58 N. W. 657. See also Evans v. Woodley, 173 Mich. 20, 138 N. W. 275.

30. Gier v. Daiber, 148 Mich. 190 (193-194), 111 N. W. 773; Frohlich v. Carroll, 127 Mich. 561 (565), 86 N. W. 1034; 27 Cyc. 85-87. A failure to complete the building in minor details, caused by the unjust and unreasonable demands of the owner, will not preclude a lien by the contractor. McMonegal v. Wilson, 103 Mich. 264 (266, 268), 61 N. W. 495. See: Kunze v. Jones, 200 Mich. 453, 166 N. W. 904 (905-906).

31. Frohlich v. Klein, 160 Mich. 142 (145-147), 125 N. W. 14. Upon the effect of the architect's certificate of completion see: §36, Acceptance by Owner.

32. §1 of Act 179 of 1891 as amended by Act 199 of 1893, Act 143 of 1897, Act 17 of 1903 and

any damages caused by his own negligence.[33] No damages can be recouped by an owner unless affirmative relief is asked in his pleadings.[34]

As an offset to recoupment of damages by the owner, as for delay in completing the building or for defective workmanship or materials, the contractor or claimant may show (1) that such delay was caused (a) by the acts or omissions of the owner, or (b) by changes in construction made by the owner directly or through the architect; (2) that the alleged defect in material or construction was due (a) to the carelessness or negligence of the owner or (b) to the owner's failure, by himself or through the architect, to perform some duty incumbent upon him;[35] (3) that the

Act 121 of 1909; C. L. 1915 (§14796), How. 2nd Ed. (§13766), C. L. 1897 (§10710). Smalley v. Gearing, 121 Mich. 190 (202), 79 N. W. 1114, 80 N. W. 797; Germain v. Stanton School District, 158 Mich. 214 (218-220), 122 N. W. 524, 123 N. W. 798; Wells v. Board of Education, 78 Mich. 260 (270-271), 44 N. W. 267. The owner may recoup his damages for admitted defects in the building without furnishing evidence of the expense of remedying such defects, especially where the facts are particularly within the knowledge of the claimant. Gier v. Daiber, 148 Mich. 190 (195-196), 111 N. W. 773.

33. Johnson v. O'Neill, 181 Mich. 326 (330), 148 N. W. 364, 150 N. W. 835. The owner cannot complain that he is not allowed to recoup his damages for a contractor's failure to perform, where, disallowing unauthorized payments to the contractor, more than enough remains to pay his damages and the claim allowed to the lien claimant. Greilick Co. v. Rogers, 144 Mich. 313 (317), 107 N. W. 885. (See, however, explanation of this case in Godfrey Lumber Co. v. Cole, 151 Mich. 280 (282), 114 N. W. 1018). Where owner made final payment to contractor a few days before time fixed for completion and when building far from complete, he could not after having recovered on contractor's bond offset against material men or recoup damages caused by contractor's non-performance. Stevens v. Garland, —— Mich. ——, 164 N. W. 516.

34. See Koch v. Sumner, 145 Mich. 358, 108 N. W. 725; Reedy Elevator Mfg. Co. v. Peck, 149 Mich. 657 (667), 113 N. W. 300; Scott v. Keeth, 152 Mich. 547 (550), 116 N. W. 183. See Form No. 27, Part Three.

35. Johnson v. O'Neill, 181 Mich. 326 (329, 330), 148 N. W 364, 150 N. W. 835. Malcomson-Houghton Co. v. Gregorian Building Co., 191 Mich. 678, 158 N. W. 126, 23 D. L. N. 405 (408). In Johnson v. O'Neill, supra, damages were claimed for defective plastering; the contractor defended on the ground that the damage was caused by failure to heat the building, a duty resting upon the owner in the absence of any reference to it in the contract. The court disallowed these damages, saying (p. 329): "It is clear that the contractor was

owner has accepted the building from the contractor as complying with the contract;[36] or (4) that the owner was present from time to time, inspecting the work as it progressed, and that the materials used were selected, in part at least, at such owner's request or upon his recommendation or with his acquiescence, and that he later took possession of the house, although protesting.[37] An owner cannot recoup his alleged damages for loss of rent because of undue delay in completion of the building where he has waived his right to insist upon completion upon the agreed date.[38]

§ 36. Acceptance by the Owner.

The owner's acceptance of the building or of the work done as satisfactory will, of course, preclude him from recouping any damages. This acceptance must, however, be clearly made out and be unequivocal, and cannot be implied from the taking of possession only, but the taking of possession must be considered in connection with all the other circumstances.[39]

under no obligation, under his contract, to supply heat. The building was being erected in midwinter. * * * Not having, in the contract, provided that the builder should furnish the heat, we think the owners must be held to have assumed that duty."

36. Hannah & Lay Mercantile Co. v. Hartzell, 125 Mich. 177 (181), 84 N. W. 52. As to the effect of acceptance of the building or work by the owner, see §36.

37. Gier v. Daiber, 148 Mich. 190 (195), 111 N. W. 773. See Kunze v. Jones, 200 Mich. 453, 166 N. W. 904 (906).

38. Kotcher v. Perrin, 149 Mich. 690 (692), 113 N. W. 284. Stevens v. Garland, —— Mich. ——, 164 N. W. 516.

39. Gier v. Daiber, 148 Mich. 190 (193), 111 N. W. 773; Frohlich v. Klein, 160 Mich. 142 (146), 125 N. W. 14; Boots v. Steinberg, 100 Mich. 134 (139), 58 N. W. 657; Hanley v. Walker, 79 Mich. 607 (619), 45 N. W. 57, 8 L. R. A. 207. See also note to Pope v. King, 16 L. R. A. (N. S.) 489. Where the contract provided that the work should be performed to the satisfaction of the owner or his superintendent, and a portion of the work was not done according to the specifications, but the change was discussed and the course taken was acquiesced in by the owner, he was deemed to have approved of the work. Boots v. Steinberg, 100 Mich. 134 (137), 58 N. W. 657. But the court in that case said: "To go further, and say that the fact of such construction without interference is conclusive of the question of approval, would be, in effect, to say that whatever the contractor could succeed in doing must be taken as approved,—a proposition that

§ 37. Abandonment or Failure to Perform by Contractor.

Where the contractor abandons or refuses to complete the work that act or refusal does not prejudice the rights of subcontractors and others entitled to liens; they are still entitled to liens for work performed and materials furnished up to the aggregate amount called for in the contract less amounts paid and properly distributed or applied to the payment of claims of subcontractors and others.[40] In case of

would put such a premium upon bad faith as to be untenable. While the contractor may rely upon what was actually approved under the contract, he is supposed to understand the specifications and how the work should be performed as well as the superintendent, and as well as, if not better than, the owner; and he cannot be permitted to invoke the doctrine of estoppel where some of its elements are lacking, making it 'a sword, and not a shield.'" As against a defense that the work was not properly done according to the contract, the architect's approval of the work as completed was, in view of the claimant's proposals, held to furnish competent evidence of the acceptance of the work. Vaughan v. Ford, 162 Mich. 37 (44), 127 N. W. 280. Upon the effect of the architect's certificate as bearing upon the acceptance and completion of the work in accordance with the contract, see: Young v. Stein, 152 Mich. 310, 116 N. W. 195, 47 L. R. A. (N. S.) 231; Germain v. Union School, 158 Mich. 214 (216-217), 122 N. W. 524, 123 N. W. 798; Maurer v. School District, 186 Mich. 223 (227-228), 152 N. W. 999; Frohlich v. Klein, 160 Mich. 142, 125 N. W. 14; Vaughan v. Ford, 162 Mich. 37 (44), 127 N. W. 280; Kunze v. Jones, 200 Mich. 453, 166 N. W. 904. As to the acceptance of a building or of certain work thereon as being a waiver of any specific warranty or guaranty, see: Scott v. Keeth, 152 Mich. 547 (549-550), 116 N. W. 183

40. Zilz v. Wilcox, 190 Mich. 486, 157 N. W. 77, 23 D. L. N. 24 (25); Frohlich v. Klein, 160 Mich. 142, 125 N. W. 14; Fairbairn v. Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469; Frohlich v. Carroll, 127 Mich. 561 (566), 86 N. W. 1034; Delray Lumber Co. v. Keohane, 132 Mich. 17 (20-22), 92 N. W. 489; Smalley v. Gearing, 121 Mich. 190 (199, 201), 79 N. W. 1114, 80 N. W. 797; 27 Cyc. 100-105; note, 17 Am. and Eng. Ann. Cas, 116-119. In Delray Lumber Co. v. Keohane (132 Mich. 17), after the contractor abandoned the contract, the owner had the house completed in another manner costing more than the amount named in the original contract; it was held that the subcontractors and materialmen were entitled to liens for such proportion of the amount of their respective claims arising before the abandonment as the original contract price was of the actual cost of constructing the house in accordance with such contract. But where it appeared that the value of the work done on the building at the time the lien was filed was less than the sum already paid to the contractor, and that the necessary cost of completing the building would exceed the unpaid portion of the contract price, a lien was denied to a materialman; the court stating that his rights,

abandonment or refusal by the contractor to complete the building according to the contract, the owner may, as against all lien claimants, complete the structure and charge the cost of completion against the contract price,[41] and may deduct or recoup his damages from such contract price, by way of cross bill or otherwise, for delay or failure to perform the contract or for defective construction.[42] The rule of distribution among lien claimants, upon abandonment by the contractor and completion by the owner, where the owner has, before receiving the sworn statement from the contractor as required by section 4, made payments on the contract for labor and material furnished, has been announced as follows: each unpaid lien claimant will receive such proportion of his entire claim as the sum of the contract price plus any extras properly chargeable is of the cost of the building.[43] The cost of the building in such

at the time he filed his lien, could not be other or greater, than would be those of the contractor in a different action. Jewell v. Paron, 94 Mich. 83 (86), 53 N. W. 951.

41. Smalley v. Gearing, 121 Mich. 190 (199), 79 N. W. 1114, 80 N. W. 797; Yeomans v. Parker, 105 Mich. 323 (324-325), 63 N. W. 316. See also: Wells v. Board of Education, 78 Mich. 260 (271), 44 N. W. 267; Halpin v. Garman, 192 Mich. 71, 158 N. W. 29, 23 D. L. N. 421 (422).

42. Vaughan v. Ford, 162 Mich. 37 (46), 127 N. W. 280; Smalley v. Gearing, 121 Mich. 190 (202), 79 N. W. 1114, 80 N. W. 797; Yeomans v. Parker, 105 Mich. 323 (324-325), 63 N. W. 316; Koch v. Sumner, 145 Mich. 358, 108 N. W. 725; Evans v. Woodley, 173 Mich. 20, 138 N. W. 275; Gier v. Daiber, 148 Mich. 190 (195-196), 111 N. W. 773. See also: Frohlich v. Carroll, 127 Mich. 561 (566), 86 N. W. 1034; Halpin v. Garman, 192 Mich. 71, 158 N. W. 29, 23 D. L. N. 421 (422-423); Wilkinson on Mechanics' Liens, pp. 82-95; §§34-35, Defective Performance or Delay and Recoupment of Damages Therefor by Owner. Where, in a case of the contractor's default, the owner paid the subcontractors who did certain work included in the original contract but who refused to proceed unless the owner would guarantee to them the payment of the contract price for said work, which the owner did, he should be allowed credit for the amount thus paid, as against the balance of the contract price unpaid. Yeomans v. Parker, 105 Mich. 323 (325-326), 63 N. W. 316.

Owner who made final payment to contractor a few days before time fixed for completion and when building far from complete, not allowed after having recovered on contractor's bond to offset or recoup against material men damages or loss of rent caused by contractor's nonperformance. Stevens v. Garland —— Mich. —— 164 N. W. 516.

43. Kotcher v. Perrin, 149 Mich. 690 (691-692), 113 N. W. 284.

cases has been held to include the amount allowed as damages for defects and delay in construction and the sums actually paid by the owner on the contract for labor and materials actually used in the building, even though paid without requiring the sworn statement required by section 4,[44] the cost to complete the building after abandon-

See also: Fairbairn v. Moody, 116 Mich. 61 (65-66), 74 N. W. 386, 75 N. W. 469; Blitz v. Fields, 118 Mich. 85, 76 N. W. 119; Smalley v. Gearing, 121 Mich. 190 (192-193, 199, 201-202), 79 N. W. 1114, 80 N. W. 797; Delray Lumber Co. v. Keohane, 132 Mich. 17 (20, 22), 92 N. W. 489. In Kotcher v. Perrin (149 Mich. 690, 113 N. W. 284), the contract price was $3,750 and the extras were $159, making a total of $3,909. The cost of the building was $5,404.69. Claimant had furnished $1,055.05 worth of material but had been paid $500. The court allowed his pro-rata share at $740.95 (evidently $\frac{3900}{5404.69}$ths or 70.232 per cent of $1,055.05), which, less the $500 already paid, left a balance due him of $240.95, and gave him a lien for the latter amount.

44. Godfrey Lumber Co. v. Cole, 151 Mich. 280 (281), 114 N. W. 1018. This is not contrary to the rule announced in Greilick Co. v. Rogers (144 Mich. 313 (317), 107 N. W. 885) disallowing unauthorized payments by the owner to the contractor in allowing the claim of a lienor in full. The distinction was pointed out very clearly by the court in the later case (Godfrey Lumber Co. v. Cole, 151 Mich. 280) wherein it was said (pp. 282-283): "Complainant insists that J. E. Greilick Co. v. Rogers (144 Mich. 313), is opposed to these views. . . . It is possible that it might have been contended in that case that complainant's claim should be reduced because the cost of the building exceeded the contract price. This claim was not in fact made and was not considered by this court, and it is a very different claim from the one which was made. If that claim had been made we would have been called upon to determine whether these payments were made for material or labor which was actually used in the building, and if we sustained the claim we would not have given credit for the entire payment—and this is what defendant asked—but would simply have reduced complainant's claim in accordance with the percentage principle applied in this case. We did not then, in that case, decide that such payment made for material or labor actually used in a building afforded no evidence of its cost. That question was not involved. The truth is that two kinds of claims have been made in suits to enforce mechanics' liens respecting payments made contrary to section 10713, 3 Comp. Laws. First, the claim has been made that the owner is entitled to credit for such payments; that is, that to the extent of such payments his obligation is reduced. That claim was made in J. E. Greilick Co. v. Rogers, supra. Section 10713 in express terms required it be denied, and we so decided. Second, the claim has been made that such payments when made for labor or material actually used in the building furnish evidence of its cost. This claim has been uniformly upheld, as shown by the decisions heretofore cited. It is radically different from the first claim. To use such payments as evidence of the cost of the building is not to give the owner credit

ment,[45] and the amount of the enforceable liens or claims allowed, but not the claims of unpaid creditors of the contractor for labor and material furnished for which no liens have been filed, or which, if filed, have been abandoned.[46] Where, upon abandonment by the contractor, the owner verbally promises to pay a subcontractor the balance due him, such promise will not establish a right to lien which would not otherwise exist, or entitle him to a lien for a greater amount than that to which he would otherwise be entitled.[47] The contractor may not abandon or refuse to complete performance of an indivisible contract under which nothing is due until the work is completed and accepted and still claim a lien for construction thereunder, where the refusal to accept is reasonable and not captious.[48]

The pendency of a damage suit for injury to a right of lateral support, which was a contingent claim of the owner against the contractor, was held not to bar a subcontractor in the enforcement of his lien.[49]

for them. In such a case he receives no credit for the payment. As heretofore stated, if the claim had not been paid it would have afforded evidence of the cost of the building. Surely, it affords no less evidence because it has been paid." See however Frohlich v. Ashton, 164 Mich. 132, 129 N. W. 18, which apparently foreshadows a modification of this rule.

45. Kotcher v. Perrin, 149 Mich. 690 (692), 113 N. W. 284.

46. Frohlich v. Ashton, 164 Mich. 132 (134), 129 N. W. 18, modifying the opinion in Frohlich v. Ashton, 159 Mich. 265 (268-269), 123 N. W. 1130. In the former case (164 Mich. 134) the court said: "It is a matter of no consequence to either the owner or the lienors, if some of the subcontractors who have furnished labor or material for the building choose to rely for payment upon the principal contractor. If they take advantage of the provisions of the statute and file and prosecute liens, their claims must be considered. If not, and the owner has neither paid nor is liable to pay their claims, they should be disregarded."

47. Delray Lumber Co. v. Keohane, 132 Mich. 17 (21-22), 92 N. W. 489.

48. Evans v. Woodley, 173 Mich. 20, 138 N. W. 275; 17 Cyc. 87, 100. A bill of the contractor will not lie to enforce a lien where the contract for the building provided that the work should be done to the satisfaction of the owner and not paid for until satisfactory, where it appears that the owner's claim that the work was not completed to his satisfaction has substantial basis. Boots v. Steinberg, 100 Mich. 134 (139), 58 N. W. 657. See also: Hanley v. Walker, 79 Mich. 607 (614-615), 45 N. W. 57, 8 L. R. A. 207.

49. Vaughan v. Ford, 162 Mich. 37 (45-46), 127 N. W. 280.

§ 38. Abandonment by Owner or Failure to Perform, Rights Upon.

When the owner, part owner or lessee fails to perform his part of the contract, and by reason thereof the other party is, without his default, prevented from completely performing his part of the contract, the statute provides that such other party shall be entitled to a reasonable compensation for as much thereof as he has performed, in proportion to the price stipulated for the whole, and that the court shall adjust his claim accordingly.[50] The owner's refusal to make payments according to the contract as the building progresses excuses the contractor upon the latter's refusal to further perform and entitles him to a lien for the part performed.[51]

50. §13 of Act 179 of 1891; C. L. 1915 (14808), How. 2nd Ed. §13778, C. L. 1897 (10722); Landyskowski v. Martyn, 93 Mich. 575, 53 N. W. 781; 27 Cyc. 87.

51. Woolf v. Schaefer, 93 N. Y. Supp. 184, 103 App. Div. 567; Thomas v. Stewart, 132 N. Y. 580, 30 N. E. 577.

CHAPTER VI.

PREREQUISITES OF A VALID LIEN AND THE PROCEDURE TO AVOID LIENS.*

§ 39. Prerequisites to Valid Lien.
40. Procedure to Avoid and Prevent Liens.
41. Sworn Statement to Be Given by Contractor Under § 4 of the Lien Law as a Prerequisite to Right to Payment, Lien or Suit.

§ 39. Prerequisites to Valid Lien.

The prerequisites to a valid lien may be stated as follows:

(a) There must be a valid contract, express or implied, with the owner, part owner or lessee, for the construction, improvement, repairs, etc., and the furnishing of materials or the performance of labor by the claimant or his assignor thereunder.[1] There must be a good faith attempt to comply with the contract or no lien can be acquired.[2]

(b) A notice to the owner within thirty days after furnishing the first material or labor is provided for under section 1 of the statute,[3] and will furnish protection to the

*In general as to the subjects comprehended in Chapter VI, see Title "Mechanics' Liens," 34 Cent. Dig. §§143-159 and 13 Dec. Dig. §§112-115.

1. See §§27-31. Clark v. Raymond, 27 Mich. 456 (459); Willard v. Magoon, 30 Mich. 273 (279); Wagar v. Briscoe, 38 Mich. 587 (594); Peninsular Electric Co. v. Norris, 100 Mich. 496 (503-504), 59 N. W. 151; Merrill v. Brant, 175 Mich. 182 (185), 141 N. W. 580.

2. Frohlich v. Klein, 160 Mich. 142 (146-147), 125 N. W. 14. Substantial compliance with the contract or substantial performance of duty thereunder is sufficient. Jossman v. Rice, 121 Mich. 270 (273-274), 80 N. W. 25; Johnson v. O'Neill, 181 Mich. 326 (331), 148 N. W. 364, 150 N. W. 835; McMonegal v. Wilson, 103 Mich. 264 (266, 268), 61 N. W. 495.

3. §1 of Act 179 of 1891 as amended by Act 121 of 1909; C. L. 1915 (14796), How. 2nd Ed. §13766, C. L. 1897 (10710); Wilkinson on Mechanics' Liens, pp. 35-36. See Form No. 1, Part Three.

subcontractor, materialman or laborer as against an erroneous statement to the owner by the contractor under section 4,[4] though such notice is for the protection of the subcontractor, laborer or materialman and is not a prerequisite to a valid lien of such subcontractor, etc., even if the owner pays the contractor without first requiring the sworn statement required by section 4;[5] nor will it be needed in the practical operations under the law if the contractor makes truthful statements to the owner.

(c) Prerequisite to any lien, of course, is the making and filing of the verified statement or claim of lien; to this must be added service of this statement upon the owner or his agent, either personally or by posting same upon the premises, except as to parties dealing directly with the owner. These will be treated in detail elsewhere.[6] The filing of proof of service has been held not requisite to the attaching of the lien but merely necessary before any subsequent proceedings are taken to enforce such lien.[7]

(d) Before a contractor may claim lien he must, in addition to the above, furnish to the owner, part owner or lessee or his agent, the statement under oath containing the

4. §4 of Act 179 of 1891; C. L. 1915 (§14799), How. 2nd Ed. (§13769), C. L. 1897 (§10713). Smalley v. Ashland Brown-Stone Co., 114 Mich. 104 (107-108), 72 N. W. 29; J. W. McCausey & Co. v. Gittleman, 201 Mich. 8, 166 N. W. 896 (897), wherein the contingency subsequently arose.

5. Green Bay Cut Stone Co. v. Fabry, 169 Mich. 544 (549), 135 N. W. 512; Smalley v. Ashland Brown-Stone Co., 114 Mich. 104 (107-108), 72 N. W. 29; Blitz v. Fields, 115 Mich. 675 (676-677), 74 N. W. 186; 27 Cyc. 106-109, 111-124. In Smalley v. Ashland Brown-Stone Co. (114 Mich. 108) the court said: "It is true that, for his own protection, the subcontractor, if he wishes to prevent a payment which will be valid as *against him*, must see to it that the sworn statement of the original contractor (if the owner exacts one) embodies his claim, or must himself serve the notice provided by section 1. This view is strengthened by the provision of section 1 that the notice by the subcontractor shall be sufficient, although not served within the ten days provided, if it be served on the owner before the sworn statement by the original contractor is made. The reason for this is that, if the notice by the subcontractor is not served, the owner may act upon the sworn statement by the original contractor. We think it should be held, therefore, that this provision is for the protection of the subcontractor or laborer, and is not a condition to the lien attaching."

6. See §§51-63.

7. Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141 (148), 71 N. W. 466.

names of, and the amounts due to, every subcontractor, materialman or laborer;[8] this statement must be furnished, if the owner, part owner or lessee or his agent can be found within the county, before the contractor may claim a valid lien or enforce his demands, though the failure by the contractor to furnish such statement has been held under special circumstances not necessarily fatal in an action on the contract.[9] The statute expressly declares, and it has been repeatedly held that, until this statement is furnished, the contractor shall have no right of action or lien against the owner, part owner or lessee on account of such contract.[10] The requirement of this statement is not dispensed

8. §4 of Act 179 of 1891, C. L. 1915 (14799), How. 2nd Ed. §13769, C. L. 1897 (10713); Wildey v. Gillett, 171 Mich. 157, 136 N. W. 1116; Wilkinson on Mechanics' Liens, pp. 37-40. See Form No 2, Part Three.

9. Barnard v. McLeod, 114 Mich. 73 (75-76), 72 N. W. 24. In this case the court said: "We held in the case of Martin v. Warren, 109 Mich. 584, that, before a lien could be enforced, this statement must be furnished, and that the owner could not be compelled to submit to the alternative of determining whether a lien existed or might yet be filed, or being subjected to costs. We see no reason for holding that this rule does not apply to an action upon the contract, when the contractor has not effected a lien, as well as to cases brought to enforce a lien. It is within the letter of the act, and to hold otherwise would place a penalty on solvency and subject a man who promptly pays his debts to dangers that one who is impecunious is practically exempt from. In the case before us it was claimed that a lien was effected, and although the evidence offered by the defendant was excluded, it may be that the defendant would not have been safe in making payment. At all events, the act forbids recovery until the statement is furnished. The defendant cannot be compelled to take the chances of litigating the question whether or not he may safely pay, but may insist upon absolute protection through the contractor's sworn statement. We do not intend to be understood as saying that the service of such sworn statement is necessarily jurisdictional, and that neglect to serve is fatal in all cases, or that it cannot be waived. Possibly it should not be allowed to stand in the way of recovery where the absence of other liens and the opportunity to effect them are conceded or obvious. This provision is a shield, and, while it should be given full effect for that purpose, its mission may be held to end with the possibility of such use, should such case arise. And it is not a sufficient answer to say that this is an action for a breach of the contract, for it is not, in any such sense as would justify the disregard of the statute."

10. §4 of Act 179 of 1891; C. L. 1915 (14799), How. 2nd Ed. §13769, C. L. 1897 (10713); Sterner v. Haas, 108 Mich. 488 (489), 66 N. W. 348; Wiltsie v. Harvey, 114 Mich. 131 (132-133), 72 N. W. 134; Barnard v. McLeod, 114 Mich. 73 (75-76), 72 N. W.

with by the fact that sixty days from the full completion of the work had expired when the bill was filed;[11] nor because all the materials and labor had been paid for and such statement had never been requested by the owner;[12] nor because all the laborers have been paid before the hearing, and no one has filed or could file liens, where the complainant filed his claim of lien forty days before the expiration of the time for other claimants to file liens and began his suit ten days before such expiration;[13] nor because the owner and the contractor are the only parties interested.[14]

24; Kerr-Murray Mfg. Co. v. Power Co., 124 Mich. 111 (112-114), 82 N. W. 801; Adams v. Central City Granite, etc. Co., 154 Mich. 448 (458), 117 N. W. 932; Wildey v. Gillett, 171 Mich. 153 (157), 136 N. W. 1116; Martin v. Warren, 109 Mich. 584, 67 N. W. 897; Dittmer v. Bath, 117 Mich. 571, 76 N. W. 89. Our court has held, in actions of assumpsit however, that the furnishing of this sworn statement may not be jurisdictional, and that neglect to furnish it may not be fatal in all cases. Barnard v. McLeod, 114 Mich. 73 (76), 72 N. W. 24; Walker v. Syms, 118 Mich. 183 (188-189), 76 N. W. 320; Bollin v. Hooper, 127 Mich. 287 (289-290), 86 N. W. 795. As to a waiver of this requirement by the owner, our court said in Sterner v. Haas (108 Mich. 489, 66 N. W. 348): " * * if a waiver can ever aid a complainant, against the express condition upon which this section (§4) permits a suit to be brought to enforce the lien (which we do not determine), it can only be under circumstances amounting to an estoppel." See also: Kerr-Murray Mfg. Co. v. Power Co., 124 Mich. 111 (113), 82 N. W. 801; Adams v. Central City Granite, etc. Co., 154 Mich. 448 (458), 117 N. W. 932. And though an owner might waive the contractor's sworn statement, so far as he himself is concerned, such waiver would not be effectual as to others. Dittmer v. Bath, 117 Mich. 571 (572), 76 N. W. 89; Adams v. Central City Granite, etc. Co., 154 Mich. 448 (458), 117 N. W. 932.

11. Martin v. Warren, 109 Mich. 584, 67 N. W. 897, wherein the court said: "It is contended * * * there was no chance for a lien to be perfected and enforced against said premises by subcontractors, laborers, or materialmen. If this contention is sound, the landowner must determine, at his peril, when said 60 days expires. If he be convinced by the contractor that the time has expired, and make payment, others asserting liens filed later may be able to convince a court to the contrary, and his payment be lost. It is no great hardship for a contractor asserting a lien to furnish to the landowner the statutory statement that shall make him safe, before subjecting him to costs of litigation upon the contractor's lien, though he might be able to show that the time within which the premises were subject to subcontractors' liens had actually expired; and it is no more than just that the landowner should be protected from unnecessary annoyance and risk of loss."

12. Sterner v. Haas, 108 Mich. 488, 66 N. W. 348.

13. Wildey v. Gillett, 171 Mich. 153, 136 N. W. 1116.

14. Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111, 82 N. W. 801.

Failure to serve the statement was held not fatal to the maintenance of an action upon the contract where it appeared that the objection was not raised on the trial in Justice Court, that the statement was never demanded, and that all bills had in fact been paid;[15] or where the time to obtain liens had long since passed, and it appeared that no such statement was ever requested and that no laborers or materialmen were in a position to assert liens or to subject the owner to litigation.[16] Delay in serving the statement until after the claim of lien is filed, but serving it before the time in which to claim a lien expired, has been held not fatal.[17] The furnishing of the statement is not a condition precedent to the claiming or enforcement of liens by others than the principal contractor; hence the statement is not required as a prerequisite to the suit of manufacturers selling materials made in their own shops for a particular structure, as they are regarded as materialmen.[18] Though the bill to enforce a lien has been taken as confessed against the owner, an adverse lienor may assert the invalidity of a contractor's lien because of the failure of the contractor to serve the statutory statement upon the owner.[19]

(e) Each person claiming a lien shall, from time to time whenever required by the owner, part owner or lessee,

15. Bollin v. Hooper, 127 Mich. 287 (289-290), 86 N. W. 795.

16. Walker v. Syms, 118 Mich. 183 (188), 76 N. W. 320; Morton v. Eaton, 141 Mich. 444 (449), 104 N. W. 726. But see cases cited under note 10 of this section and especially Martin v. Warren, 109 Mich. 584, 67 N. W. 897, wherein it was held that a contractor was not relieved from serving his sworn statement although the time for filing liens had passed. Failure of a contractor to furnish the sworn statement is excused in an action in assumpsit where the specifications provided that he need furnish such statement only in case he did not give bond, and he furnished such bond and it was accepted by defendants, the owners. Maurer v. School District, 186 Mich. 223 (231), 152 N. W. 999.

17. Holliday v. Mathewson, 146 Mich. 336 (338), 109 N. W. 669.

18. Kerr-Murray Mfg. Co. v. Power Co., 124 Mich. 111, 82 N. W. 801.

19. Wiltsie v. Harvey, 114 Mich. 131 (134), 72 N. W. 134. Likewise if an owner can waive a contractor's omission to serve the sworn statement, his attempt to do so will not be effectual as against a mortgagee of the premises. Dittmer v. Bath, 117 Mich. 571 (573), 76 N. W. 89; Adams v. Central City Granite, etc. Co., 154 Mich. 448 (458), 117 N. W. 932.

and within five days from demand, furnish a written statement of the amount of work and materials furnished to date and unpaid, as nearly as can be ascertained, under penalty of a forfeiture of his lien.[20] Though the owner is not prejudiced, the failure by the lienor to furnish the owner such statement of his claim within five days after it is demanded, if before filing the bill to enforce the lien, forfeits the lien,[21] but where the bill of complaint contained an itemized account of complainant's claim, the lien was held not to be lost by non-compliance with a demand made after the bill was filed and the subpoena (summons) served.[22]

(f) Within one year from the date of filing claim of lien, proceedings by bill in chancery must be instituted to enforce the claim and to foreclose the lien, or the lien will be lost.[23]

(g) Upon instituting proceedings to enforce the lien its validity and protection ceases, at least as to third persons without actual notice of the lien, or after one year without notice of the proceedings to enforce, unless *lis pendens* is filed for record with the register of deeds.[24]

§ 40. Procedure to Avoid and Prevent Liens.

The act is designed to secure an equitable distribution of the proceeds of contracts subject to its provisions; the rights of owner, contractor, subcontractor, materialman and laborer are all preserved by its provisions; the owner is entitled to his construction or improvement contracted for of the character and in the manner called for in the contract and at the contract price, but is required to be watchful in

20. §8 of Act 179 of 1891; C. L. 1915 (14803), How. 2nd Ed. §13773, C. L. 1897 (10717).
21. Frolich v. Beecher, 139 Mich. 278, 102 N. W. 736.
22. Rohde v. Weinberg, 156 Mich. 318, 120 N. W. 789.
23. §9 of Act 179 of 1891 as amended by Act 199 of 1893 and Act 143 of 1897; C. L. 1915 (14804), How. 2nd Ed. §13774, C. L. 1897 (10718).
24. §10 of Act 179 of 1891; C. L. 1915 (14805), How. 2nd Ed. §13775, C. L. 1897 (10719). See Form No. 24, Part Three.

the interests of subcontractors, materialmen and laborers to see that they actually receive what is coming to them. The contractor is entitled to receive the portion of the proceeds which he may retain as his own as against others entitled to lien, but is required to furnish by sworn statement the details which will permit the separation of amounts due or to become due to those with whom he contracts in order that they may be protected and that the owner may withhold such amounts for their protection and his own. The owner may avoid liens by requiring an indemnity bond[25] or by compliance with the statutory provisions.[26] To avoid liens by the latter method the procedure following is mapped out:

(a) Right of owner to require statement. That the owner, part owner or lessee may be protected, he may at

25. Stoddard v. Hibbler, 156 Mich. 335, 120 N. W. 787, 24 L. R. A. (N. S.) 1075. Indemnity against liens and action on bonds of indemnity. Rockel on Mechanics' Liens, §§168-172. See Form Nos. 11 and 12, Part Three.

26. §4 of Act 179 of 1891; C. L. 1915 (14799), How. 2nd Ed. §13769, C. L. 1897 (10713). This provision points out the way in which the owner may safely make payments; that is, he need incur no risk. First, if he refuses payment until he is provided with a sworn statement of the contractor, and complies with it; Second, if the money paid is distributed, in accordance with the statute, among those who might acquire liens, even though he makes payments without the sworn statement. The owner is not required to make payments beyond the amount called for in the contract. It will be seen, therefore, that he is fully protected if he follows the requirements of the statute. It is true that the original contractor may not be able at all times to get the moneys into his own hands from the owner as rapidly as the contract calls for, —that is, his sworn statement may show that there is an indebtedness to subcontractors, materialmen and laborers, and these moneys the owner may withhold, and pay directly to those persons. But the contract must be presumed to have been made in view of these provisions of the statute. Smalley v. Gearing, 121 Mich. 190 (197-198), 79 N. W. 1114, 80 N. W. 797. Hannah and Lay Co. v. Hartzell, 125 Mich. 177 (180), 84 N. W. 52. But under the second suggestion above, care should be taken, in prorating without the sworn statement, that heed be given to the priorities or preferences among the lienors under section 16 of the act. See §83 herein. Owner making payment on contractor's sworn statement that no amounts due or to become due is protected though at the time work was in progress and a large amount of material was on the premises. Stevens v. Garland, —— Mich. ——, 164 N. W. 516 (519) J. W. McCausey & Co. v. Gittleman, 201 Mich. 8, 166 N. W. 896 (897).

any time during the progress of the work demand in writing of the contractor a statement of the names of subcontractors, materialmen and laborers and the amounts due or to become due each; this must then be made by the contractor and given to the owner, part owner or lessee, or his agent; if such contractor fails to furnish such statement within five days after demand, he becomes liable to the owner, part owner or lessee demanding it, each time he refuses or neglects to comply with such demand, in the sum of one hundred dollars and for all actual damages occasioned by such neglect or refusal, to be recovered in any appropriate proceeding.[27]

(b) Statement by contractor. The original contractor is required, whenever any payment of money shall become due from the owner, part owner or lessee, or whenever he desires to draw any money from the owner, part owner or lessee on such contract, to make out and give to such owner, part owner or lessee, or his agent, a statement under oath of the number and names of every subcontractor or laborer in his employ, and of every person furnishing materials, giving the amount, if anything, which is due or to become due to them or any of them for work done or materials furnished.[27]

(c) Right of owner to retain sums due contractor. The owner, part owner or lessee, or his agent, may retain out of any money then due or to become due to the contractor, an amount sufficient to pay all demands that are due or to become due to such subcontractors, laborers and materialmen, and pay the same to them according to their respective rights, and all payments so made shall, as between such owner, part owner or lessee, and such contractor, be considered the same as if paid to such original contractor.[27]

(d) Right of owner to retain sums due contractor. The owner, part owner or lessee may at any time retain from any moneys due or to become due to the original

27. §4 of Act 179 of 1891; C. L. 1915 (14799), How. 2nd Ed. §13769, C. L. 1897 (10713). Under last reference to this note see also §39.

contractor, an amount sufficient to pay all demands owing or unpaid, to any subcontractor, materialman or laborer, who has filed and served the notice in manner and form as provided in section one of this act.[27]

(e) Contractor's right to lien or action before making statement. Until such statement is made in the required form, the contractor has no right of action or lien against the owner, part owner or lessee on account of such contract.[27]

(f) Effect of payments before statement made. Any payment made by the owner, part owner or lessee, before such statement is made, or without retaining sufficient money, if that amount be due or is to become due, to pay the subcontractors, laborers or materialmen, as shown by the statement, is considered illegal and in violation of the rights of the persons intended to be benefited by this act, and the rights of such subcontractors, laborers and materialmen to lien are not affected thereby.[28] If neither the owner, part owner or lessee, nor his agent can be found within the county, it is unnecessary for the contractor to deliver such statement as a prerequisite to proceedings to enforce his rights.[29]

(g) Effect of payments made, but not distributed. It is the duty of an owner, in making payments to a contractor, to see that they are distributed pro rata among all the claimants of whom the owner has notice,[30] and payments made by him not so distributed, although founded

28. §4 of Act 179 of 1891; C. L. 1915 (14799), How. 2nd Ed. §13769, C. L. 1897 (10713). Blitz v. Fields, 115 Mich. 675 (677), 74 N. W. 186; Munroe v. Merrell, 113 Mich. 491, 71 N. W. 850; Fairbairn v. Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469; Smalley v. Ashland Brown-Stone Co., 114 Mich. 104, 72 N. W. 29; Zilz v. Wilcox, 190 Mich. 486, 157 N. W. 77 23 D. L. N. 24 (27); Greilick Co. v. Rogers, 144 Mich. 313 (317); 107 N. W. 885; Stevens v. Garland, —— Mich. ——, 164 N. W. 516. See also: J. W. McCausey & Co. v. Gittleman, —— Mich. ——, 166 N. W. 896 (1899) [illegible] owner is not protected as above by a later affidavit in proper form relating to a subsequent payment.

29. §4 of Act 179 of 1891; C. L. 1915 (14799), How. 2nd Ed. §13769, C. L. 1897 (10713).

30. Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 157 N. W. 96, 23 D. L. N. 73 (76). But if the owner fails to see that payments to the contractor are properly distributed, or if the debtor fails to elect as to what account such payment shall apply, the creditor may elect. Id.

upon the contractor's sworn statement, will not protect him against liens.[31] The statute provides in substance that the risk of all payments to the original contractor, after the owner shall have received the notice above mentioned, (i. e., the preliminary notice of subcontractors, laborers and materialmen to such owner or his agent), or before the contractor shall have furnished such owner with the sworn statement, shall be upon such owner, part owner or lessee until the expiration of sixty days, within which claims for lien may be filed; and no payment made to any contractor before the expiration of said sixty days shall defeat any lien of any subcontractor, materialman or laborer, unless such payment shall have been distributed among such subcontractors, materialmen or laborers, or if distributed in part only, then to the extent of such distribution.[32]

31. Frohlich v. Carroll, 127 Mich. 561 (566-567), 86 N. W. 1034; §4 of Act 179 of 1891; C. L. 1915 (14799), How. 2nd Ed. §13769, C. L. 1897 (10713.)

32. §1 of Act 179 of 1891 as amended by Act 199 of 1893, Act 143 of 1897, Act 17 of 1903, and Act 121 of 1909; C. L. 1915 (14796), How. 2nd Ed. §13766, C. L. 1897 (10710). Payments by an owner without requiring from the contractor a statement under section 4 are at the owner's risk, and his property is not relieved from lien because he believed that money previously advanced to materialmen on the contractor's order had paid them in full, there having been no misrepresentation by claimant. Munroe v. Merrell, 113 Mich. 491, 71 N. W. 850. The owner is only entitled to protection for such payments made without requiring the sworn statement of amounts due subcontractors, etc., from the contractor as are distributed prorata among all those entitled to participate. Fairbairn v. Moody, 116 Mich. 61 (63), 74 N. W. 386, 75 N. W. 469. Payments made without requiring the sworn statement under section 4 and not distributed prorata among those entitled thereto, cannot be allowed in the owner's favor as against a materialman's lien. Greilick Co. v. Rogers, 144 Mich. 313 (317), 107 N. W. 885; Hannah & Lay Co. v. Hartzell, 125 Mich. 177 (180), 84 N. W. 52. The owner is relieved from liability to the extent to which his payments have been distributed among subcontractors, materialmen and laborers entitled to participate, though the money they received is not the identical money paid by the owner to the contractor; where the contractor furnishes materials their value is to be included in determining the amount to be distributed; prorata distribution among all claimants is contemplated, and the owner is not entitled to credit for any amount received by a claimant in excess of his proportionate share of the payment or amount due on the contract. Smalley v. Gearing, 121 Mich. 190 (199-202), 79 N. W. 1114, 80 N. W. 797. In determining the cost of a structure, in order to ascertain for what proportion of their claims the claimants are entitled to liens, payments made without requiring a statement

§ 41. Sworn Statement to Be Given By Contractor Under § 4 of the Lien Law as a Prerequisite to Right to Payment, Lien or Suit.

STATE OF MICHIGAN,
COUNTY OF ——. } ss.

—— being duly sworn, deposes and says that[88] ——

from the contractor, which actually went to pay for materials or labor going into the structure, are to be included. Godfrey Lumber Co. v. Cole, 151 Mich. 280, 114 N. W. 1018. All a lienor can claim is that the contract price be apportioned among the subcontractors and those furnishing material and labor, and where the cost of the completed structure exceeds the contract price, the claimant is entitled to such proportion of his claim as the contract price plus any extras properly chargeable bears to the cost of the complete structure. See §37, Chapter V, Abandonment or Failure to Perform by Contractor, note 43. Where, after the owner had made payments to the contractor without requiring the sworn statement under section 4, the contractor abandoned his contract and the owner completed the building, it was held that the amounts paid by the contractor to laborers and materialmen, together with outstanding liens and the cost of completion, divided into the contract price plus any extras properly chargeable, gives the percent of his claim which each lienor is entitled to recover. Kotcher v. Perrin, 149 Mich. 690 (691-692), 113 N. W. 284. A materialman who, while the materials were being furnished, received payments from the contractor without any request or direction from the latter as to their application, had the right to apply them on charges other than those for materials entering into the building in question. Union Trust Co. v. Casserly, 127 Mich. 183 (185-186), 86 N. W. 545; Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 157 N. W. 96, 23 D. L. N. 73 (76); People v. Grant, 139 Mich. 26 (28), 102 N. W. 226. An owner is not relieved from liability to a subcontractor where he pays the contractor the full contract price without requiring the sworn statement, although such subcontractor failed to serve upon such owner the preliminary notice mentioned in section 1 of the act. Blitz v. Fields, 115 Mich. 675, 74 N. W. 186. An owner cannot waive service of the contractor's statement so as to give such contractor as a lienor the right to share with other lienors or to take precedence over a subsequent mortgage. Dittmer v. Bath, 117 Mich. 571 (573), 76 N. W. 89; Wiltsie v. Harvey, 114 Mich. 131 (134), 72 N. W. 134; Adams v. Central City Granite, etc. Co., 154 Mich. 448 (458), 117 N. W. 932. A subcontractor is estopped to assert a lien as to payments made by the owner to the contractor at the subcontractor's request. Fairbairn v. Moody, 116 Mich. 61 (62-63), 74 N. W. 386, 75 N. W. 469. Where the owner, on an appeal to the Supreme Court, claimed that the lower court allowed more than was due to the lien claimants, but did not point out any mistakes in the computation or the evidence upon which it should be corrected, or the improper application of the rule governing the computation, the decree awarding the amounts allowed was not disturbed. Frohlich v. Carroll, 127 Mich. 561 (566-567), 86 N. W. 1034.

33. "He is" or "he is familiar with the facts and by reason of

the original contractor for the[34] —— of the[35] —— situated on the following described property, viz: —— that the following is a statement of the number and names of every subcontractor and laborer in the employ of[36] —— in connection with said[35] —— and of every person furnishing materials therefor; that the amounts due or to become due to such subcontractors, laborers and persons for work done and materials furnished at and to the date hereof, is correctly and fully set forth opposite their names, respectively, in said statement, to wit:

No.	Name	Labor or Materials[37]	Amount

Deponent further says that[38] —— has not employed, or procured material from or sub-contracted with, any person or persons other than those above mentioned, and owes no moneys for labor upon or material for the[34] —— of said[35] —— other than the sums above set forth, and that no other person, firm or corporation furnished any labor or material for[36] —— or for his benefit or for any person for him in connection with the[34] —— and[35] ——.

Subscribed and sworn to before me, this —— day of —— A. D. 19—.

Notary Public, —— County, Michigan.

My Commission expires —— 19—.

—— he makes this affidavit in behalf of —— who" is or are.

34. Building or altering, improving, repairing, erecting or ornamenting.

35. House, building, machinery, wharf or structure, etc.

36. "This deponent" or "said ——"

37. If subcontractor, give more particular description in this column.

38. "He" or "said ——"

CHAPTER VII.

THINGS LIMITING OR AFFECTING THE RIGHT TO CLAIM OR TO ENFORCE LIENS.*

§ 42. Specific Contract That Liens Shall Not Attach.
43. The Taking of Security as Discharging Right to Liens.
44. The Retention of Title as Preventing Lien.
45. Acceptance of Notes or Other Agreement to Pay as Preventing Lien.
46. Retaining Possession.
47. Effect of Proceedings at Law to Enforce Payment of Amount Due.
48. Contingent Liability of Contractor to Owner as Preventing Lien.
49. Ordering or Refusing Payment.

§ 42. Specific Contract That Liens Shall Not Attach.

The right to lien may be waived or contracted away by the principal contractor or by any other person interested or concerned in the structure or improvement by a specific contract upon that subject. It is not, however, permissible for the principal contractor or any subcontractor, by contract with the owner, to thus waive the right to lien on the part of another contractor, subcontractor or furnisher of materials or performer of labor.[1] The owner may protect himself against liens by observance of the provisions of law with regard to sworn statements and payments and their

* In general as to the subjects comprehended in Chapter VII, see Title "Mechanics' Liens," 34 Cent. Dig. §§381-426 and 13 Dec. Dig. §§207-244.

1. Smalley v. Gearing, 121 Mich. 190 (198), 79 N. W. 1114, 80 N. W. 797.

distribution,[2] or may secure protection by securing an adequate and sufficient bond,[3] but he cannot secure that protection through a general contract with any principal contractor or subcontractor that no liens shall be claimed or be permitted to attach.[4] To permit such a contract would be to furnish the means to destroy the remedial and salutary effects of the statute. It is established that a mechanics' lien being direct, in behalf of persons entitled and not by subrogation, a claimant is not bound by stipulations in the original contract to which he is not a party, except as to the contract price.[5] Provisions in the contract for construction calling for arbitration or completion to the satisfaction of the owner must ordinarily be complied with to establish a right to a lien.[6]

§ 43. The Taking of Security as Discharging Right to Liens.

The taking of security from the owner by one who may be or may become entitled to lien is not a relinquishment of the right to successfully claim lien, unless the security be upon the real property to which the lien would ordinarily apply,[7] except there be an express agreement to waive such lien, the statutory requirement in that regard being that no lien provided for in the act shall be defeated or waived by the taking by the lien claimant from any person of any security for such debt other than upon the real estate itself, in the absence of an express agreement that the taking of such security shall be waiver of the lien.[8]

2. Smalley v. Gearing, 121 Mich. 190 (197-198), 79 N. W. 1114, 80 N. W. 797.

3. Stoddard v. Hibbler, 156 Mich. 335, 120 N. W. 787, 24 L. R. A. (N. S.) 1075.

4. Smalley v. Gearing, 121 Mich. 190 (198), 79 N. W. 1114, 80 N. W. 797.

5. Vaughan v. Ford, 162 Mich. 37 (45), 127 N. W. 280; 27 Cyc. 94.

6. Wilkinson on Mechanics' Liens, pp. 41-42. Boots v. Steinberg, 100 Mich. 134, 58 N. W. 657.

7. Barrows v. Baughman, 9 Mich. 217; 27 Cyc. 274; Grant v. Strong, 18 Wall. 623. See §73.

8. §25 of Act 179 of 1891; C. L. 1915 (14820), How. 2nd Ed. §13790, C. L. 1897 (10734); 27 Cyc. 273-276.

§ 44. The Retention of Title as Preventing Lien.

The retention of title by the vendor upon a sale of personal property which is to be installed in some building or otherwise attached to land, thus enabling him to reclaim and take possession of the property in case of failure to pay for the same, will not prevent him from enforcing a lien upon the property in which the chattels are installed or to which they are attached, as the remedies will ordinarily be deemed cumulative and not inconsistent.[9]

§ 45. Acceptance of Notes or Other Agreement to Pay as Preventing Lien.

Acceptance of the contractor's note does not prevent the assertion of a lien by a materialman for materials furnished for the price of which the note was given;[10] nor, upon authority of a decision under the law giving a lien upon watercraft, does the claimant's acceptance of the note of

9. Presque Isle Sash & Door Co. v. Reichel, 179 Mich. 466 (475-476), 146 N. W. 231; Warner Elevator Mfg. Co. v. Capitol Investment, etc. Ass'n, 127 Mich. 323 (325-326), 86 N. W. 828; Peninsular Electric Co. v. Norris, 100 Mich. 496 (506-507), 59 N. W. 151. See also: Perkins v. The Golden Girl, 185 Mich. 200 (210-212), 151 N. W. 660; Kirkwood v. Hoxie, 95 Mich. 62 (66-67), 54 N. W. 720; 27 Cyc. 276; Wilkinson on Mechanics' Liens, p. 11; Marinette Iron Works Co. v. Cody, 108 Mich. 381, 66 N. W. 334. See §73. In Warner Elevator Mfg. Co. v. Capitol Investment, etc. Ass'n, (127 Mich. 323, 86 N. W. 828) the plaintiff sold an elevator and attachments to a hotel, reserving title in the property until fully paid. Payments not being made according to the contract, plaintiff filed a statement of lien and later a bill of complaint to enforce its lien, but some time thereafter the proceedings were discontinued. Plaintiff then began suit in trover under its reservation of title. The court not only held that there was no inconsistency in the remedies, but that, by electing to enforce its lien in an attempt that proved unsuccessful, it did not waive its right to claim title under its reservation. (pp. 326-327).

10. Smalley v. Gearing, 121 Mich. 190 (204), 79 N. W. 1114, 80 N. W. 797; 27 Cyc. 267-273. See §73. "The rule seems to be established in Missouri, and it is so in many of the other states, that a contractor does not waive his right to file a mechanics' lien by receiving from the owner of the building a promissory note for the amount due, payable at a time beyond the expiration of the period within which he is required to file his lien, but within the period within which suit must be commenced to enforce the lien, the taking of the note merely suspending the right

the owner preclude his right to lien,[11] though where a materialman accepted a note of the owner which postponed the time of payment beyond the period within which lien might be filed, it was held, after rights of third persons had intervened, that the right to lien was waived.[12] The statute, however, permits liens for accounts not due,[13] which would perhaps lead to the abrogation of this rule.

§ 46. Retaining Possession.

It may be questioned whether a contractor, who might enforce his lien by appropriate proceedings under the lien law, can retain possession of the building to enforce payment of the contract price after time for performance has expired and he has ceased work, claiming that the building is completed according to the contract.[14]

§ 47. Effect of Proceedings at Law to Enforce Payment of Amount Due.

The right to lien and to pursue the personal responsibility of the debtor are cumulative, and perhaps co-ordinate remedies, and it is expressly provided by statute that the

of action. McMurray v. Taylor, 30 Missouri 263; Ashdown v. Becker, 31 Missouri 465; Jones v. Hurst, 67 Missouri 568, 572. This rule is based upon the principle, recognized in that State, that the execution of a note for a pre-existing debt is not a payment of the debt, but only presumptively so." Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 136, 12 S. Ct. 181, 35 L. ed. 961.

11. Perkins v. The Golden Girl, 185 Mich. 200 (210-211), 151 N. W. 660. And a vendor's right to enforce a lien upon machinery furnished to the lessees of a mill is not lost by the action of its attorneys in taking from such vendees a bill of sale of the machinery, where the attorneys' authority to accept such bill of sale was conditioned upon securing the right to remove the property, and the consent of the millowner to such removal was not obtained. Marinette Iron Works Co. v. Cody, 108 Mich. 381 (387-388), 66 N. W. 334.

12. Blakeley v. Moshier, 94 Mich. 299 (303), 54 N. W. 54; 27 Cyc. 270. See however: Smalley v. Ashland Brown-Stone Co., 114 Mich. 104 (106-107), 72 N. W. 29.

13. §26 of Act 179 of 1891; C. L. 1915 (14821), How. 2nd Ed. §13791, C. L. 1897 (10735). See Form No. 23, Part Three.

14. Beller v. Stange, 27 Mich. 312. See Pratt v. Tudor, 14 Texas 37 (39-40).

creditor may maintain an action at common law in like manner as if he had no lien for the security of his debt.[15]

§ 48. Contingent Liability of Contractor to Owner as Preventing Lien.

A lien of a subcontractor was held not prevented by a contingent liability of the contractor to the owner for defects of construction and damages where it appeared that the contract was fully performed.[16]

§ 49. Ordering or Refusing Payment.

A lien claimant cannot assert a lien as to payments made by the owner to the contractor on the claimant's request,[17] nor as to payments tendered by the owner and refused.[18]

15. §22 of Act 179 of 1891; C. L. 1915 (14817), How. 2nd Ed. §13787, C. L. 1897 (10731). See §73. And it is not necessary that the liens be discharged before commencement of the suit at law, an adequate remedy being afforded by section 23 for refusal to so discharge them, after the debts secured by such liens have been fully paid. Cady v. Fairplain Literary Ass'n, 135 Mich. 295 (297), 97 N. W. 680; Baumhoff v. St. Louis, etc. Ry., 171 Mo. 120, (132), 71 S. W. 156; 27 Cyc. 267, 320-323. Taking judgment under void law for enforcement of liens held not to relinquish lien. Kirkwood v. Hoxie, 95 Mich. 62 (66), 54 N. W. 720. But in a number of jurisdictions it is held that relying upon the general credit of the owner or contractor rather than upon the property may amount to a waiver of the right to lien. 27 Cyc. 49.

16. Vaughan v. Ford, 162 Mich. 37 (45-47), 127 N. W. 280.

17. Fairbairn v. Moody, 116 Mich. 61 (62-63), 74 N. W. 386, 75 N. W. 469.

18. Blakeley v. Moshier, 94 Mich. 299 (303), 54 N. W. 54; Moynahan v. Moore, 9 Mich. 9.

CHAPTER VIII.

CLAIMING AND PERFECTION OF LIEN; PROCEDURE TO ACQUIRE LIENS.*

§ 50. When the Right to Lien Exists.
51. ——— Statutory Requirement.
52. Statement or Claim of Lien, Under Section 5 of Lien Law.
53. Prerequisites to Claim of Lien by Contractor.
54. Time Within Which Claim of Lien to be Filed.
55. Surplusage and Errors in General.
56. Statement of Time of Furnishing Materials and to Whom Furnished, in Claim of Lien.
57. Filing of Claim of Lien.
58. Description of Property.
59. Name of Owner, Part Owner or Lessee.
60. Name of Claimant.
61. Amount Claimed.
62. Verification of Claim of Lien.
63. Service of Copy of Statement or Claim of Lien.
64. Proof of Service.
65. Proof of Service of Claim or Statement of Account for Lien Under Section 6 of Lien Law.
66. Duty of Register of Deeds upon Filing Lien.
67. Fees.
68. Right of Action on Claim After Filing Lien.

§ 50. When the Right to Lien Exists.

The right to protection by lien accrues at least as soon as work is begun upon, or materials are delivered to, the structure and from that time throughout the furnishing or construction, a right exists on the part of the contractor

*In general as to the subjects comprehended in Chapter VIII, see Title "Mechanics' Liens," 34 Cent. Dig. §§160-279 and 13 Dec. Dig. §§116-179.

and every subcontractor, laborer, or materialman to look to the property for their protection and as furnishing priority in and security for the amounts owing to them.[1] The lien, however, should not be claimed or filed and cannot be perfected until the last of the materials shall have been furnished or the last of the labor performed by the person claiming the lien.[2]

§ 51. ——— Statutory Requirement.

The statute fixing the period within which liens may be filed, providing what shall be contained therein and outlining the substantial requirements,[3] provides that:

Every person, or his agent or attorney, whether contractor, subcontractor, materialman or laborer, who wishes to avail himself of the provisions of this statute, shall make and file in the office of the register of deeds, in the county or counties in which said real estate, house, building, structure or improvement to be charged with the lien is situated, a just and true statement or account of the demand due him, over and above all legal set-offs, setting forth the time when such materials were furnished or labor performed, and for

1. The right to lien is held complete where the furnisher of materials had furnished practically all and was ready to supply the remainder when he should receive the dimensions. Frohlich v. Carroll, 127 Mich. 561 (565), 86 N. W. 1034. Three judges concurred in the statement that the right to a lien accrued upon delivery of material on the premises under the contract as a general rule, or at any rate at the time work was commenced upon the building. Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578 (584), 132 N. W. 117. See: Kay v. Towsley, 113 Mich. 281, 71 N. W. 490; Kerr-Murray Manufacturing Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111 (114), 82 N. W. 801; also 27 Cyc. 215, 218 and note.

2. §5 of Act 179 of 1891; C. L. 1915 (14800), How. 2nd Ed. §13770, C. L. 1897 (10714); 27 Cyc. 150-152. See §54.

3. §5 of Act 179 of 1891; C. L. 1915 (14800), How. 2nd Ed. §13770, C. L. 1897 (10714). The claim of lien and its requisites; Jones on Liens, 3rd Ed. §§1389-1456; Rockel on Mechanics' Liens, §§71-124; Boisot on Mechanics' Liens, §§350-373, 374-446, 450, 461; Phillips on Mechanics' Liens, 3rd Ed. §§337-390; Kneeland on Mechanics' Liens, 2nd Ed. §§182-195. Description of the materials or labor in claim of lien. Rockel on Mechanics' Liens, §§108-109; Boisot on Mechanics' Liens, 395-399.

whom, and containing a correct description of the property to be charged with the lien, and the name of the owner, part owner or lessee, if known, which statement shall be verified by affidavit. Such verified statement or account shall be filed within sixty days from the date on which the last of the materials shall have been furnished or the last of the labor shall have been performed by the person claiming the lien, which statement may be in the following form:[3a]

STATE OF MICHIGAN, }
COUNTY OF ——. } SS.

A B, of —— being duly sworn, says that he furnished certain labor (or materials) in and for building (or altering, improving, repairing, erecting or ornamenting, as the case may be) a certain —— situated on the land hereinafter described, in pursuance of a certain contract with C D, the owner (or part owner or lessee, contractor, subcontractor or other person, as the case may be). The performance of such labor (or the furnishing of such materials, or both), was begun on the —— day of —— 19—; and the last of such labor was performed (or such materials furnished, or both), on the —— day of ——, 19—; and there is justly and truly due deponent therefor from the said C D, over and above all legal set-offs, the sum of —— dollars, for which amount deponent claims a lien on said land (or buildings) of which —— is the owner (or part owner, or lessee as the case may be), which premises are described as follows——.

A —— B——.

Subscribed and sworn to before me this —— day of —— 19—.

——————.

My commission expires —— day of ——, 19—.

A statement or claim of lien should be sufficient in and

3a. See Form Nos. 3 and 4, Part Three.

of itself, without resort to extrinsic proof or other documents to supplement deficiencies in it.[4] That the exact form of statement set forth in the statute was not followed was held not fatal where the claim answered substantial requirements;[5] but entering the name of a wrong party as contractor in the written statement of lien has been held fatal.[6] While it is better to claim separate liens for each structure and description a single lien for several structures upon adjacent lots would probably be held valid particularly if the work was all embraced in a single contract.[7] Honest and unintentional errors in matters not jurisdictional in the statements required to be set up in the claim of lien may generally be said not to defeat the lien.[8] A claim of lien may not be amended or reformed after the time has expired in which it was required to be filed,[9] particularly where the rights of third parties have intervened or are affected.

§ 52. Statement or Claim of Lien, Under Section 5 of Lien Law.

STATE OF MICHIGAN, }
COUNTY OF ——. } ss.

—— of —— being duly sworn, says that he[a] —— furnished certain[b] —— in and for[c] —— a certain[d] —— situ-

4. Armstrong v. Chisolm, 91 N. Y. Supp. 693, cited in Godfrey Lumber Co. v. Kline, 167 Mich. 629 (633), 133 N. W. 528; John F. Noud Co. v. Stedman, 193 Mich. 459, 160 N. W. 547.

5. Kleinert v. Knoop, 147 Mich. 387 (389-390), 110 N. W. 941; 27 Cyc. 150-154.

6. Lacy v. Piatt Power & Heat Co., 157 Mich. 544, 122 N. W. 112.

7. 27 Cyc. 126-131, 192-193. See §9 and notes.

8. 27 Cyc. 200-210. See §61.

9. 27 Cyc. 206-207, 208.

a. If the Statement is made by an agent or attorney, or by one member of a firm, state such fact in this space, inserting the name of claimant just before the words "furnished certain."

b. In this space insert "labor," or "materials," or both, as the case may be. If materials, describe the character of materials, etc.

c. In this space insert "building," or "altering," "improving," "repairing," "erecting," "ornamenting," or "putting in" or any two or more of these words, as the case may be.

d. In this space insert descrip-

ated on the land hereinafter described, in pursuance of a certain contract with —— the[e] ——; that the[f] —— was begun on the —— day of —— A. D. 19—, and that the last of such[g] —— on the —— day of —— A. D. 19—, and that there is justly and truly due to[h] —— therefor from the said —— over and above all legal set-offs, the sum of —— dollars, for which amount the said —— claims, a lien on said[i] —— of which[j] —— which premises are described as follows: to-wit ——.

——————.

Subscribed and sworn to before me this —— day of——, 19—.

——————.

Notary Public, —— County, Michigan.

My commission expires[k] —— day of ——, 19—.

§ 53. Prerequisites to Claim of Lien by Contractor.

As described in detail and commented upon elsewhere,[10] before a contractor can become entitled to or claim a valid lien, he must serve the owner with a sworn statement setting forth the number and names of subcontractors, materialmen and laborers, and the amount due to each, in order that the owner may reserve the amounts due to such persons or see

tion of the house or other structure which has been built, repaired etc.

e. In this space insert "the owner ——," or "lessee——," "contractor," "subcontractor," or other person, as the case may be, etc.

f. In this space insert "performance of such labor," or "the furnishing of such materials," or both said clauses, as the case may be.

g. In this space insert the following: "labor was performed," or "materials were furnished," or both said clauses as the case may be.

h. If the statement is made by an agent or attorney, or by one member of a firm, insert in this space the name of the individual or firm claiming the lien. If statement is made by claimant of lien himself, insert in this space "this deponent."

i. In this space insert "land," or "building," or both, as the case may be.

j. In this space insert "—— is" or "are the owner ——," "part-owner ——" or "lessee ——," as the case may be.

k. For claims of lien under exceptional circumstances precedents may be found in 12 Ency. of Forms 13647 to 13721.

10. See §39, par. (d).

that amounts paid are properly distributed among them for his and their protection if he so desires. Such sworn statement is not essential to the attaching of liens in favor of others than the principal contractor.

§ 54. Time Within Which Claim of Lien to be Filed.

The statute requires the statement or claim of lien to be filed within sixty days from the date on which the last of the material shall have been furnished or the last of the labor shall have been performed by the person claiming the lien.[11] The right of lien arises from delivery to the owner under the contract rather than from delivery to the contractor, and for that reason the sixty day period for filing liens ordinarily dates from the delivery at the building, and not from the delivery to the contractor, or at any other place.[12] Small amounts of material furnished or minor

11. §5 of Act 179 of 1891; C. L. 1915 (14800), How. 2nd Ed. §13770, C. L. 1897 (10714). Hannah & Lay Co. v. Hartzell, 125 Mich. 177 (180), 84 N. W. 52; 27 Cyc. 140-150; Wilkinson on Mechanics' Liens, pp. 49-53. Upon the time of filing of the claim of lien. Rockel on Mechanics' Lien, §94; Boisot on Mechanics' Liens, §§466-495; Kneeland on Mechanics' Liens, 2nd Ed. §§170-181a. If the claim is prematurely filed there is no lien. Jones on Liens, 3rd Ed. §1430; Phillips on Mechanics' Liens, 3rd Ed. §323a. 27 Cyc. 150-151; See §50, note 2. Time of furnishing last material as fixing date for period of limitation on filing claim of lien. Jones on Liens, 3rd Ed. §1427-1451; Rockel on Mechanics' Liens, §§95-99; Phillips on Mechanics' Liens, 3rd Ed. §§324-330. Complainant furnished material upon estimate made by him and afterwards delivered further material from time to time as ordered. Held: that all material was furnished on single or continuous contract and 60 days limited by statute began to run upon last delivery. Union Trust Co. v. Casserly, 127 Mich. 183 (185), 86 N. W. 545; Smalley v. Gearing, 121 Mich. 190 (203), 79 N. W. 1114, 80 N. W. 797. The time of furnishing articles not suited to, ordered for or used on, the building against which lien is claimed, cannot extend the time for filing lien for materials furnished. Battle Creek Lumber Co. v. Poland, 150 Mich. 690, 114 N. W. 671. The date of furnishing materials to the contractor in good faith for a building, but not in fact used in the building by him, nor delivered on the land, but sold to a third person, cannot be regarded as the date of the last furnishing from which the time to file a mechanics' lien begins to run. North v. Globe Fence Co., 144 Mich. 557 (558), 108 N. W. 285.

12. North v. Globe Fence Co., 144 Mich. 557 (558-559), 108 N.

services rendered by the claimant, after the real completion of the contract and upon his own initiative, will not aid in extending the time within which to file liens.[13]

§ 55. Surplusage and Errors in General.

Matters unnecessarily included in the claimant's statement of his lien and not misleading to, or working any fraud upon, the persons against whom the lien is claimed, are treated as surplusage and do not operate to invalidate the lien.[14] Substantial compliance with the terms of the statute is both indispensable and sufficient. The claim need

W. 285; Smalley v. Gearing, 121 Mich. 190 (202-203), 79 N. W. 1114, 80 N. W. 797; Wentworth v. Tubbs, 53 Minn. 388. See Buchanan v. Selden, 43 Nebr. 559, 61 N. W. 732.

13. Hartley v. Richardson, 91 Me. 424 (428-429), 40 Atl. 336; Hobkirk v. Portland Baseball Club, 44 Or. 605, 76 Pac. 776; O'Driscoll v. Bradford, 171 Mass. 231, 50 N. E. 628; Sulzer-Vogt Machine Co. v. Rushville Water Co., 160 Ind. 202 (208), 65 N. E. 583; Burleigh Building Co. v. Merchant Brick, etc. Co., 13 Colo. App. 455, 59 Pac. 83; Schwab & Sons Co. v. Frieze, 107 Mo. App. 553, 81 S. W. 1174; Congdon v. Kendall, 53 Nebr. 282 (287), 73 N. W. 659; McLean v. Sanford, 51 N. Y. Supp. 678, 26 App. Div. 603; Harrison & Bro. Homeopathic Ass'n, 134 Pa. St. 558; Brown & Haywood Co. v. Trane, 98 Wis. 1; King v. Ship Building Co., 50 Ohio St. 320 (329), 34 N. E. 436; Boisot on Mechanics' Liens, §486. Where work or material is, in good faith, furnished at the request and with the knowledge of the owner, to remedy defects in the original work, it is generally held that this is sufficient to establish a new period from which the time for filing notice or claim of a lien is to be computed; but, where the work contracted for is completed according to contract, as the contractor believes, but he later discovers defects, and voluntarily undertakes after the time for completing the contract has expired, without authority from the owner, to remedy the trouble, it is held in most cases, especially where the work or material is trivial, that such work does not extend the time for filing. Notes, 12 L. R. A. (N. S.) 864; 35 Id. 907-908; 24 Am. & Eng. Ann. Cas. 217-218. Effect of adding or furnishing new items to the structure or work as extending the time for filing lien. Note 35 L. R. A. (N. S.) 901-909. The time on a running account is computed from the date of the last item in determining when claim of lien must be filed. Note 7 Am. & Eng. Ann. Cas. 947-948. Where work under contract intermittent, extending over a long period, the later items cannot be said not to be in fulfillment of the contract where claimant acted in good faith in performance of his contract and diligently pursued his remedy. Fox v. Benham Mfg. Co., —— Mich. ——, 164 N. W. 385.

14. Waters v. Johnson, 134 Mich. 436 (438), 96 N. W. 504; McMonegal v. Wilson, 103 Mich.

not be in the exact words of the statute, nor will it be defeated because awkwardly drawn or because of purely technical defects.[15]

§ 56. Statement of Time of Furnishing Materials and to Whom Furnished, in Claim of Lien.

The statute requires the statement or claim of lien to set forth the time when and the person for whom the materials were furnished or the labor was performed.[16] This requires the naming of the owner, contractor or subcontractor, as is appropriate to the facts, and if the furnishing is to a subcontractor it might be well to name the contractor also. It has been held that the mistaking of the name of the con-

264 (266), 61 N. W. 495. In this case it was held that, where the claimant declared in his affidavit or statement of lien that he "furnished certain labor and material in and for building a house * * * in pursuance of a certain contract with * * the owner * * ", such affidavit or statement left no room to infer that claimant did not assert himself to be the principal contractor. See also: John Paul Lumber Co. v. Hormel, 61 Minn. 303, 63 N. W. 718.

15. 27 Cyc. 153-154. A statement of lien conforming substantially to the statutory form, except not stating that the material was furnished in pursuance of a contract with the principal contractor or some other person, but stating instead that the material was furnished for improving the premises and that the owner knew that such material was to be furnished to the contractor by the claimant, is sufficient. Kleinert v. Knoop, 147 Mich. 387 (389-390), 110 N. W. 941. Errors or defects in claim or statement of lien and amendments thereof. Rockel on Mechanics' Liens, §§121-123; Jones on Liens, 3rd Ed. §§1422-1426, 1455-1456, 1408-1417; Boisot on Mechanics' Liens, §§359, 423-430, 432, 440, 462-465, 504; Phillips on Mechanics' Liens, 3rd Ed. §§327b, 389a; Houck on Law of Liens, §210; Kneeland on Mechanics' Liens, 2nd Ed. §§161-165. The right to file amended claim to perfect an imperfect claim, exists where done within statutory period. Notes, 15 Am. & Eng. Ann. Cas. 1086-7. Though there is no such right in suit to enforce lien, after expiration of statutory period. 35 Am. & Eng. Ann. Cas. 60-65. See Kirkwood v. Hoxie, 95 Mich. 64, 54 N. W. 720, where second claim under one lien law permitted after first filing of claim under another law declared to be invalid. That claimant filed two statements of lien for the same debt, the second being to supply supposed deficiencies in the first, does not make an election between the statements necessary. Fox v. Benham Mfg. Co., —— Mich. ——, 164 N. W. 385.

16. §5 of Act 179 of 1891; C. L. 1915 (14800), How. 2nd Ed. §13770, C. L. 1897 (10714). As to naming person furnished, see 27 Cyc. 178-181. As to statement of the time of furnishing material, labor or services in claim

tractor in the claim of lien was a fatal defect and is not subject to amendment.[17] Where the notice or claim of lien was filed so near to the expiration of the sixty day period that the date of furnishing the last material became important, it was held insufficient to state that the last material was furnished "on or about" a certain date.[18] Good practice requires an itemized statement of the various dates of furnishing or performing, though fixing the time between two given dates is generally sufficient.[19]

§ 57. Filing of Claim of Lien.

The claim of lien must be filed in the office of the Register of Deeds of the county or counties where the real estate, house, building, structure, or improvement to be charged with the lien, is situated, within the sixty day period limited for filing.[20] In this respect the statute should be strictly followed as the failure to file within the prescribed period would undoubtedly be fatal to the claim.[21]

of lien, see: Jones on Liens, 3rd Ed. §1407; Rockel on Mechanics' Liens, §§113-114; Boisot on Mechanics' Liens, §§418-422; Wilkinson on Mechanics' Liens, p. 56; 27 Cyc. 181-184. Error in the statement of lien as to the time when the first and the last materials were furnished will not invalidate the lien where the claim was in fact filed within sixty days from the furnishing of the last material. Union Trust Co. v. Casserly, 127 Mich. 183 (185), 86 N. W. 545. Where the statement of lien merely gave the initial of the first name of the owner, this was held sufficient, where the owner's name appeared in that form in all the papers and there was no question as to his identity. Hicks v. Finbarg, 189 Mich. 332 (338), 155 N. W. 359.

17. Lacy v. Piatt Power & Heat Co., 157 Mich. 544 (546), 122 N. W. 112. Statement in claim of lien of person to whom materials, labor or service furnished—contractor or employer. Rockel on Mechanics' Liens, §112; Boisot on Mechanics' Liens, §§386-389.

18. Godfrey Lumber Co. v. Kline, 167 Mich. 629 (631-635), 133 N. W. 528. See however John F. Noud Co. v. Stedman, 193 Mich. 459, 160 N. W. 547, in which it was held that where the statement of the furnishing of the last of the material was definite, the statement as to furnishing the first of the material as "on or about" a certain date, would not invalidate the lien.

19. 27 Cyc. 181-183; Wilkinson on Mechanics' Liens, p. 56.

20. §5 of Act 179 of 1891; C. L. 1915 (14800), How. 2nd Ed. §13770, C. L. 1897 (10714); 27 Cyc. 124.

21. 27 Cyc. 136-138. The lien has been held not to be invalidated by the elapsing of a day be-

The claim of lien of a contractor, if filed within the statutory period, is not invalid because filed before a sworn statement under section 4 is served upon the owner.[22]

§ 58. Description of Property.

The statement or claim of lien must contain a correct description of the property to be charged with the lien. While care should be exercised to use a correct description, it is not absolutely essential that it be perfect if it is sufficient to permit the property to be readily identified.[23] Such description should be used as will indicate exactly to what property the claimant desires his lien to attach, and if his

tween the date of the affidavit and the time of filing claim of lien. Fairbairn v. Moody, 116 Mich. 61 (64), 74 N. W. 386, 75 N. W. 469.

22. Holliday v. Mathewson, 146 Mich. 336 (338), 109 N. W. 669.

23. As to the amount of land which may be reached, see §9. The description will be sufficient, so far at least as the owner-contractee is concerned, if it identifies the land upon which the building is situated. Hannah & Lay Co. v. Hartzell, 125 Mich. 177 (178-179), 84 N. W. 52. Jossman v. Rice, 121 Mich. 270 (273-274), 80 N. W. 25; 27 Cyc. 157-187. Whether the description is in fact sufficient to identify the property has been held a question for a jury, where such description was not manifestly insufficient. Cleverly v. Mosley, 148 Mass. 280, 19 N. E. 394; Phillips on Mechanics' Liens, 3rd Ed. §384. Where the land is imperfectly described, but the building is accurately described, the lien will perhaps stand against the building alone. Hannah & Lay Co. v. Mosser, 105 Mich. 18 (31), 62 N. W. 1120. This decision was under the Act of 1891 as amended in 1893. An imperfect and somewhat ambiguous description will be held good if, after the rejection of false and impossible descriptions, there remains sufficient to identify and locate the premises. Hick v. Finbarg, 189 Mich. 332, (338) 155 N. W. 359, 22 D. L. N. 966 (967-968). As a general rule the fact that the description embraces more land than is subject to the lien does not defeat the lien as to the land properly subject thereto, if there is no fraudulent intent and no one is injured thereby. So also the inclusion of a less area of land than might have been covered does not defeat the lien. 27 Cyc. 159-161. Where the statement of lien described the premises upon which the improvements were made as two lots (naming them) in a certain plat, and the bill of complaint described the two lots as in another plat, the lien was held not defeated where the only lots owned by the contractee in the village, corresponding to those set forth by number in the statement of lien, were the ones on which the improvements were made and as described in the bill of complaint. Hannah & Lay Co. v. Hartzell, 125 Mich. 177 (178-179), 84 N. W. 52. Statement of description of property in lien claim. Jones on Liens, 3rd Ed. §§1421-1426; Rockel on

contract is with a person possessing less than a full ownership it is well to investigate and state the facts in that regard in detail.

§ 59. Name of Owner, Part Owner or Lessee.

The claim of lien should also contain the name of the owner, part owner or lessee,[24] if known, and it is well to state in addition the character of the ownership or interest in or extent of the property intended to be subjected to the lien. If for any reason the owner's name is not known then that fact and the reasons for lack of knowledge must appear;[25] an omission or a misstatement of the owner's name is fatal to the validity of the lien, unless the claimant's ignorance of the owner's true name is chargeable to the owner himself.[26] The owner referred to in the statute is the owner at the time the claim of lien is made.[27]

Mechanics' Liens, §§103-105; Boisot on Mechanics' Liens, §§431-436; Phillips on Mechanics' Liens, 3rd Ed. §§378-391.

24. Wilkinson on Mechanics' Liens, p. 59; 27 Cyc. 164-170. Failure to state the owner's name in the statement of lien is fatal, though the name could be supplied by reference to an attached copy of the contract and to the pleadings, John F. Noud Co. v. Stedman, 193 Mich. 459, 160 N. W. 547. Where there are several owners or co-tenants against whose interest lien is intended to be claimed, all should be named. Drew Glass Co. v. Eagle Mills, 1 Kan. App. 614, 42 Pac. 387. The owner must be named in the claim of lien. Jones on Liens, 3rd Ed. §§1397-1403; Rockel on Mechanics' Liens, §§101, 106-107, 110; Boisot on Mechanics' Liens, §§379-385, 390-394. Effect of error in naming owner. Notes, 14 Am. & Eng. Ann. Cas. 689-690.

25. 27 Cyc. 165 et. seq.

26. Frohlich v. Carroll, 127 Mich. 561 (565-566), 86 N. W. 1034; Waters v. Johnson, 134 Mich. 436 (440), 96 N. W. 504. The statement is not fatally defective because giving the owner's first name by initial; where the contract was signed by initial and that name was used throughout, it was held that as there was no dispute as to the identity of the person, the claim was purely technical and without merit. Hicks v. Finbarg, 189 Mich. 332 (338), 155 N. W. 359; Knabb's Appeal, 10 Pa. St. 186; Richards v. Lewiston, 19 Mont. 128, 47 Pac. 645. That a wife, unknown to a claimant, had a community interest in the property will not defeat a lien claim in which she is not named, has been held in several cases. 27 Cyc. 168.

27. We cannot suppose that the law contemplated so futile a proceeding as a notice to one who has no interest whatever in the property, simply because he once had

§ 60. Name of Claimant.

The name of claimant or claimants should appear in the statement. Where the material was furnished by, and the dealings were with, a partnership, the use of the firm name in the claim of lien furnishes the necessary information to the owner.[28] It would seem wise to state the capacity in which the claim was acquired and whether claimant was contractor, subcontractor, materialman, assignee or otherwise.[29] While the statute does not in terms require the claimant to sign, that is the invariable practice, though the omission of signature if the name of the claimant sufficiently appeared, might not be fatal. There appears to be nothing to prevent signature by agent or attorney[30]

§ 61. Amount Claimed.

The claim of lien must contain a just and true statement or account of the demand due to the claimant, over and above all legal set-offs.[31] The word "due" as used in the statute, is synonymous with the word "owing" and a claim properly made, filed and served for a debt evidenced by notes not yet due, creates a valid lien.[32] The burden is

an interest therein. Waters v. Johnson, 134 Mich. 436 (439), 96 N. W. 504; 27 Cyc. 169-170.

28. Kleinert v. Knoop, 147 Mich. 387 (390), 110 N. W. 941. See 27 Cyc. 194.

29. 27 Cyc. 171, citing McMonegal v. Wilson, 103 Mich. 264, 61 N. W. 495.

30. 27 Cyc. 193-194, Wilkinson on Mechanics' Liens, pp. 54-55. It should be noted that the form suggested in section 5 of the act provides for the signature of the party making the statement.

31. §5 of Act 179 of 1891, C. L. 1915 (14800), How. 2nd Ed. §13770, C. L. 1897, (10714); 27 Cyc 188-193; Wilkinson on Mechanics' Liens, p. 57 et seq. Interest is allowable on liquidated items from the date when due. 27 Cyc. 214. See Smalley v. Gearing, 121 Mich. 190 (205), 79 N. W. 1114, 80 N. W. 797. Statement in claims of sum due for which lien is claimed. Jones on Liens, 3rd Ed. §§1409-1420; Rockel on Mechanics' Liens, §§115-117; Boisot on Mechanics' Liens, §§409-420. As to effect of filing claim for an excessive amount, see note, 34 Am. & Eng. Ann. Cas. 878-885; also note 35 of this section.

32. Smalley v. Ashland Brown-Stone Co., 114 Mich. 104 (106), 72 N. W. 29, holding that section 5 should be construed in connection with sections 25 and 26 providing for the enforcement of

upon the claimant to establish the value of services for which lien is claimed.[33] The amount due and unpaid and for which lien is claimed should be correctly stated. No lien is acquired for a greater amount than claimed, and claimant should be careful to limit his claim to the amount actually due or owing to him and which he is entitled to include in his claim of lien for the work or labor performed or materials furnished, with regard to the particular property upon which lien is being claimed.[34] Good faith on the part of the lien claimant is required, and his statement or claim of lien must be truthful. He may not intentionally or carelessly claim greater amounts than he is entitled to, under the expectation that his lien will certainly be good for a lesser amount actually due him.[35] Honest error on his part will not, however, invalidate the lien if there is

claims not presently due and payable. See however: Blakeley v. Moshier, 94 Mich. 299, 54 N. W. 54.

33. Doetsch v. Wetlaufer, 157 Mich. 202, 121 N. W. 746.

34. 27 Cyc. 184-187. The materials must be ordered for the structure upon which lien is claimed; if not, subsequently using them in the construction of that building does not entitle the furnisher to a lien. People v. McAllister, 49 Mich. 12, 12 N. W. 891. See: Stout v. Sawyer, 37 Mich. 313; Van Cleve Glass Co. v. Erratt, 110 Mich. 689, 68 N. W. 978. In the absence of a special contract the reasonable value of what was done or furnished fixes the amount for which lien may be claimed. 27 Cyc. 211-214. The contract provision that there should be no charge for extras unless agreed to in writing was held to preclude the inclusion in a lien of extras furnished upon a verbal demand. Gier v. Daiber, 148 Mich. 190, 111 N. W. 773. Materials sold to the contractor for use in a building, but not actually used therein, cannot furnish the basis for a lien against it. Smalley v. Gearing, 121 Mich. 190 (203), 79 N. W. 1114, 80 N. W. 797. See also: Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 136, 12 S. Ct. 181, 35 L. Ed. 961; 27 Cyc. 31, 46, 47. The contractor, for his own protection, has the right to include in the amount claimed by him in his statement of lien, the respective amounts due from him to his subcontractors, laborers, and materialmen, as the law giving the owner the right to retain from the amount due the contractor the respective amounts due to the subcontractors, etc., does not discharge the legal obligation of the contractor to them until they are fully paid. Halpin v. Garman, 192 Mich. 71, 158 N. W. 29, 23 D. L. N. 421-422; Kunze v. Jones, 200 Mich. 453, 166 N. W. 904 (907). Upon the question whether transportation or freight charges may be included in the lien, see §19, notes 5 and 6.

35. An intentional, thoughtless or careless claiming of a larger amount than is due invalidates the lien, and where the claimant places

an attempted and substantial compliance with the statutory requirements and none of the indispensable conditions are omitted.[86] It is not necessary for the contractor to state in his claim of lien the names of the subcontractors or laborers who have been, but are no longer, employed by him, or the

upon record a statement that he knows is incorrect, the lien is lost. Gibbs v. Hanchette, 90 Mich. 657 (660), 51 N. W. 691; Griff v. Clark, 155 Mich. 611 (613), 119 N. W. 1076; 29 L. R. A. (N. S.) 305. The inclusion of speculative items will also invalidate the lien. Brennan v. Miller, 97 Mich. 182, 56 N. W. 354. As to the claiming of an excessive amount in the statement of lien, see note in 29 L. R. A. (N. S.) 305 et seq. No lien is acquired where the amount due is not ascertainable. 27 Cyc. 41, 42, 160. Nor can a lien be acquired where a materialman furnishes material for several jobs simultaneously, making no application of the money paid by the contractor to any specific house until the contractor becomes unable to pay, when he arbitrarily fixes an amount for a certain house as a proper share of the contractor's debt attributable thereto, but which amount is in fact 25 per cent too large. Greilick Co. v. Taylor, 143 Mich. 704, 107 N. W. 712. Where it appeared that a materialman changed his accounts and altered the credits of payments which had been made on the contractor's account after the contractor had absconded, so as to increase the amount for which he could claim a lien against the contractee owner, it was held that his action was an attempted fraud which destroyed the lien. Hannah & Lay Co. v. Mosser, 105 Mich. 18 (25-26), 62 N. W. 1120. That the claimant's book account against the contractor contained other charges than those relating to the building in question is not of itself sufficient to show a waiver of his right to lien. Union Trust Co. v. Casserly, 127 Mich. 183 (185), 86 N. W. 545. See also: Wilkinson on Mechanics' Liens, p. 58.

36. An unintentional claiming of an excessive amount through honest mistake will not invalidate the lien. Lamont v. Le Fevre, 96 Mich. 175 (176-177), 55 N. W. 687; Scheibner v. Cohnen, 108 Mich. 165, 65 N. W. 760; McMonegal v. Wilson, 103 Mich. 264 (266-267), 61 N. W. 495; Fairbairn v. Moody, 116 Mich. 61 (64), 74 N. W. 386, 75 N. W. 469; Hulbert v. Just, 126 Mich. 337 (339), 85 N. W. 872; Frohlich v. Carroll, 127 Mich. 561 (565), 86 N. W. 1034; McAllister v. Des Rochers, 132 Mich. 381 (383), 93 N. W. 887; Union Trust Co. v. Casserly, 127 Mich. 183 (186), 86 N. W. 545; Frohlich v. Ashton, 159 Mich. 265 (267-268), 123 N. W. 1130; Vaughan v. Ford, 162 Mich. 37 (45), 127 N. W. 280; Perkins v. The Golden Girl, 185 Mich. 200 (209-210), 151 N. W. 660; Gibbs v. Hanchette, 90 Mich. 657 (659-661), 51 N. W. 691; Halpin v. Garman, 192 Mich. 71, 158 N. W. 29, 23 D. L. N. 421 (422). Springer Land Ass'n v. Ford, 168 U. S. 527; 27 Cyc. 202-206. As to the claiming of an excessive amount in the statement of lien, see note in 29 L. R. A. (N. S.) 305 et seq. The inclusion in the amount stated of amounts which have already been paid to the subcontractors, etc., by the owner will not invalidate the contractor's lien where the latter was honestly mistaken and at the time did not know that such subcontractors and others had been paid. Halpin v. Garman,

names of the materialmen who have furnished material, unless there is some amount still due them.[37]

§ 62. Verification of Claim of Lien.

The statement or claim of lien before being filed or served must be verified by affidavit;[38] this requirement is mandatory and the failure to properly verify is fatal.[39] The lien is not invalidated by the elapsing of a day between the date of the affidavit and the time of filing the claim of lien.[40] Where a firm is interested, one partner may verify the claim,[41] though one partner cannot as a notary take the oath of another partner verifying the claim,[42] and the affidavit should not be taken before an attorney who is to appear in any litigation regarding it,[43] although a claim of lien has been held not to be fatally defective because it was sworn to before the attorney who prepared it, where there is no proof that he was professionally engaged in any cause

192 Mich. 71, 158 N. W. 29, 23 D. L. N. 421 (422). 27 Cyc. 205. Kunze v. Jones, 200 Mich. 453, 166 N. W. 904 (907). Where there was a slight variance between the amount claimed and the amount awarded by the court, due to the fact that a part of the material was used upon another job, and the record contained no evidence of bad faith, such variance was disregarded and did not invalidate the lien. Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 157 N. W. 96, 23 D. L. N. 73 (77-78).

37. Halpin v. Garman, 192 Mich. 71, 158 N. W. 29, 23 D. L. N. 421-422.

38. §5 of Act 179 of 1891; C. L. 1915 (14800), How. 2nd Ed. §13770, C. L. 1897 (10714). Gibbs v. Hanchette, 90 Mich. 657 (659), 51 N. W. 691. Upon signature and verification of claim of lien see: Jones on Liens, 3rd Ed. §§1452-1454; Rockel on Mechanics' Liens, §§119-120; Boisot on Mechanics' Liens, §§444, 450-457, 458-461; Phillips on Mechanics' Liens, 3rd Ed. §§365-366a.

39. Lindsay v. Huth, 74 Mich. 712, 42 N. W. 358; 27 Cyc. 194-195; Wilkinson on Mechanics' Liens, p. 60.

40. Fairbairn v. Moody, 116 Mich. 61 (64), 74 N. W. 387, 75 N. W. 469.

41. A claim which is verified by one partner, stating the existence of the partnership, giving the names of the members thereof, and stating that the affidavit is made in their behalf, etc., properly shows authority to make and verify the claim of lien. Yeomans v. Parker, 105 Mich. 323 (324), 63 N. W. 316. See also Kleinert v. Knoop, 147 Mich. 387 (390), 110 N. W. 941; 27 Cyc.

42. Smalley v. Bodinus, 120 Mich. 363, 79 N. W. 567.

43. C. L. 1915 (§12082), How. 2nd Ed. (§1286), C. L. 1897 (§2640).

connected with it.[44] There appears nothing to prevent verification by agent or attorney and, in case of a corporation, verification by an officer thereof is proper.[45] Where the statement of lien was verified by two affidavits, one preceding and one following an account of the items of such claim, and the first affidavit was sufficient in form and properly verified, the fact that the second affidavit was sworn to before an attorney who was a member of the firm who later acted as claimant's attorneys in the enforcement of his lien, even though it were treated as void, would not invalidate the first affidavit.[46]

§ 63. Service of Copy of Statement or Claim of Lien.

Within ten days[47] after filing the claim of lien the claimant must serve or cause to be served a copy thereof on the owner, part owner or lessee, against whose interest the lien is claimed if he can be found within the county,[48] or in

44. Zilz v. Wilcox, 190 Mich. 486, 157 N. W. 77, 23 D. L. N. 24 (26). See McMonegal v. Wilson, 103 Mich. 264, 61 N. W. 495.

45. 27 Cyc. 195.

46. McMonegal v. Wilson, 103 Mich. 264 (266), 61 N. W. 495.

47. Service of copy of claim of lien on the owner the day before filing is a substantial compliance with the statute. Fairbairn v. Moody, 116 Mich. 61 (64), 74 N. W. 386, 75 N. W. 469. In general, upon service of notice of claim of lien, see: Boisot on Mechanics' Liens, §§361-371; Phillips on Mechanics' Liens, 3rd Ed. §367a. Upon sufficiency of service of statement or notice of lien on agent of owner, see Note, 16 Am. & Eng. Ann. Cas. 355-357.

48. Service must be upon the person owning the premises at the time claim of lien is filed. Waters v. Johnson, 134 Mich. 436 (439), 96 N. W. 504. Notice of claim of lien may be served on holder of record title though a trustee in bankruptcy actually holds title. Fox v. Benham Mfg. Co., —— Mich. ——, 164 N. W. 385. The land owner may waive statutory service so far as his own rights are concerned. Mouat v. Fisher, 104 Mich. 262, 62 N. W. 338. Where claim of lien was served upon a wife alone and she was made sole defendant in a bill to enforce, it was held that neither her land nor a building erected thereon, under a contract with her husband in his own behalf, were subject to a lien for materials entering into the construction. Hall v. Erkfitz, 125 Mich. 332, 84 N. W. 310. But where a husband contracted in his own name on his wife's behalf for erection of buildings on her land pursuant to agreement between themselves to defeat liens thereby, the fact that the claim of lien for materials furnished was

case of his absence from the county, on the agent having in charge such premises, if within the county,[49] and if neither principal nor agent in charge can be found within the county where the premises are situated, the copy shall be served by posting it in a conspicuous place on the premises within five days after the same might have been personally served on the principal or agent. The statutory requirement in this regard is as follows: Every person filing such statement or account as provided in the preceding section, except those persons contracting or dealing directly with the owner, part owner or lessee of such premises shall, within ten days after the filing thereof, serve on the owner, part owner or lessee of such premises, if he can be found within the county, or in case of his absence from the county, on his agent having in charge of such premises within the county wherein the property is situated a copy of such statement or claim; but if neither of such persons can be found within the county where such premises are situated, then such copy shall be served by posting in some conspicuous place on said premises within five days after the same might have been served personally, could the principal or agent, as aforesaid, have been found.[50] The

served upon the husband alone as the owner of the land will not prevent lien. Frohlich v. Carroll, 127 Mich. 561 (564-565), 86 N. W. 1034. A mortgagee whose interest is represented by a conveyance, absolute in form, need not be served. Kay v. Towsley, 113 Mich. 281 (283), 71 N. W. 490.

49. Service on the owner's wife residing on the premises in his absence, she apparently having the authority usually exercised by wives over homestead property in the absence of their husbands, has been held sufficient as being on the agent in charge. Greilick Co. v. Rogers, 144 Mich. 313 (316-317), 107 N. W. 885. Substituted service upon an agent and bookkeeper in charge of the owner's office is insufficient. Wiltsie v. Harvey, 114 Mich. 131 (133-134), 72 N. W. 134. Personal service is imperative where possible, and a lien will fail because of defective service of the statement of lien where the subcontractor knew that the owner had a resident agent but served the notice only by posting a copy on the front part of the building. Zilz v. Wilcox, 190 Mich. 486, 157 N. W. 77, 23 D. L. N. 24 (25).

50. §6 of Act 179 of 1891 as amended by Act 199 of 1893; C. L. 1915 (14801), How. 2nd Ed. §13771, C. L. 1897 (10715). For cases of failure to make

service must be by the statutory method and service by mail, personal service outside the county, service on an agent not in charge of the premises, or service by posting where the owner or an agent in charge could have been found within the county, is insufficient.[51] Where the land owner accepts service in lieu of the statutory service he will not be heard to complain.[52]

§ 64. Proof of Service.

Proof of service of the copy of claim of lien upon the owner, part owner or lessee, and the date and manner thereof, shall be made by the affidavit of the person serving or posting the same, which proof of service shall be filed in the office of the register of deeds of the county in which the property is situated before any subsequent proceedings shall be taken for the enforcement of such lien.[53]

proper service under former statutes, see: Comstock v. McElroy, 52 Mich. 324 (327-329), 17 N. W. 931.

51. Hannah & Lay Co. v. Mosser, 105 Mich. 18 (21-25, 29-30), 62 N. W. 1120; Wiltsie v. Harvey, 114 Mich. 131 (133-134), 72 N. W. 134; Zilz v. Wilcox, 190 Mich. 486, 157 N. W. 77, 23 D. L. N. 24 (25). Wilkinson on Mechanics' Liens, pp. 63-66; 27 Cyc. 134-136. It has however been held that the purpose of notice to the land owner is to prevent him paying the principal contractor. Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141 (148), 71 N. W. 466. And under the law of 1885 it was held the service of notice was material only when rights of third persons were involved. Kirkwood v. Hoxie, 95 Mich. 62 (65), 54 N. W. 720; Lamont v. LeFevre, 96 Mich. 175, 55 N. W. 687. Service of the statement of lien is not insufficient because made by an agent who received his authority from the attorney who drafted the statement and not from the contractor, the action of the attorney being within the scope of his authority. Cady v. Fairplain Literary Ass'n, 135 Mich. 295 (297), 97 N. W. 680.

52. Mouat v. Fisher, 104 Mich. 262 (263-264), 62 N. W. 338.

53. §6 of Act 179 of 1891 as amended by Act 199 of 1893; C. L. 1915 (14801), How. 2nd Ed. §13771, C. L. 1897 (10715); Wilkinson on Mechanics' Liens, pp. 67-69. Filing proof of service with register of deeds before commencing proceedings to enforce lien has been held to be directory. Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141 (148), 71 N. W. 466. Proof of personal service of claim of lien was held not successfully impeached by mere denial of defendant that service was made on her. Zilz v. Wilcox, 190 Mich. 486, 157 N. W. 77, 23 D. L. N. 24 (26). Where an affidavit of service of notice of claim of lien was attached to and endorsed up-

§ 65. Proof of Service of Claim or Statement of Account for Lien Under Section 6 of Lien Law.

STATE OF MICHIGAN, } ss.
COUNTY OF ——. }

—— of the —— of —— in said County being duly sworn, says that on the —— day of —— 19—, at —— in said County of —— he served a true copy of a Statement of Account and Lien, (which Statement had been duly filed in the office of the Register of Deeds of said County, on the —— day of —— 19—, and of which Statement of Account and Lien a true copy is hereto annexed), on[54] —— the[55] —— by[56] ——. And further this deponent says not.

——.

Subscribed and sworn to before me, this —— day of —— 19—.

——.

——.

Notary Public, —— County, Mich.
My Commission expires ——.

on the notice as filed, which notice stated the name of the owner of the premises, the fact that such affidavit merely showed service upon "him personally" not naming the owner—will not be held fatal to a lien, especially where the point was first raised in the Supreme Court. Bourget v. Donaldson, 83 Mich. 478 (481-484), 47 N. W. 326. See Form No. 5, Part Three.

54. In this space insert the name of owner, part owner, or lessee of the premises, or of the agent in charge of the same.

55. In this space insert either one of the following phrases: "owner," "part owner," or "lessee," or "agent of the owner," "part owner," or "lessee," of the premises described in said Statement of Account and Lien. In case of service on agent, add "said agent having charge of said premises within the county wherein the same are situated," or words of similar import.

56. In space indicated insert one of the following clauses, as the case may be, viz.: "By handing to said —— personally, a true copy of said Statement of Account and Lien," or "by posting a true copy of said Statement of Account and Lien at —— on said premises, that being a conspicuous place on said premises."

In case of service on agent, insert also in this space the following: "This deponent further says that —— the owner ("part owner" or "lessee") of said premises was absent from said County of —— from —— 19—, to —— 19— that during that time this deponent diligently searched for said —— but that this deponent was unable to find him within said County of ——,

§ 66. Duty of Register of Deeds Upon Filing Lien.

The register of deeds should indorse upon every statement or account, the date of its filing, and make an abstract thereof in a book to be kept by him for that purpose, such book to be properly indexed, and to contain such date of filing, the name of the person claiming the lien, the amount of the lien, the name of the person against whom the lien is filed, and a description of the property to be charged with the same.[57]

§ 67. Fees.

The register of deeds shall receive the sum of seventy-five cents as his fees for the filing of the statement or account, and all subsequent papers filed with him relating to such lien.[58]

§ 68. Right of Action on Claim After Filing Lien.

By claiming lien the creditor does not waive or relinquish his right to maintain an action upon the debt at law in like manner as if he had no lien for security, and the institution of proceedings at law does not operate to waive the lien. The applicable statutory provision is: Except as

and that because of such absence of said ____ from said County service was made on his said agent in charge of such premises as above set forth."

In case of service by posting, insert also in this space the following: "This deponent further says that from ____ 19__ to ____ 19__," (being the period of ten (10) days allowed by law for personal service) "this deponent diligently searched for ____ the owner ("part owner" or "lessee") of said premises, and for ____ his agent (or "for an agent of said ____) having charge of said premises within said County, but that this deponent was unable to find said ____, or ____ his above mentioned agent" (or "any such agent of said ____") within said County of ____, and that by reason thereof service was made by this deponent, by posting a true copy of said Statement of Account and Lien as above set forth."

57. §5 of Act 179 of 1891; C. L. 1915 (14800), How. 2nd Ed. §13770, C. L. 1897 (10714).

58. §5 of Act 179 of 1891; C. L. 1915 (14800), How. 2nd Ed. §13770, C. L. 1897 (10714).

herein otherwise expressly provided, nothing in this act contained shall be construed to prevent any creditor in any such contract from maintaining an action thereon at common law in like manner as if he had no lien for the security of his debt.[59] The institution of proceedings at law to recover the debt does not operate to waive the lien, though it is best that no such proceedings should be pending at the time when the bill to foreclose the lien is filed or is pending.[60]

59. §22 of Act 179 of 1891; C. L. 1915 (14817), How. 2nd Ed. §13787, C. L. 1897 (10731). Notwithstanding claims of lien have been filed, the contractor's assignee may bring action upon the contract where all liens filed have been assigned to him and the time for filing other liens has expired. Cady v. Fairplain Literary Ass'n, 135 Mich. 295, 97 N. W. 680. See: Walker v. Syms, 118 Mich. 183 (188), 76 N. W. 320; Bollin v. Hooper, 127 Mich. 287, 86 N. W. 795; Morton v. Eaton, 141 Mich. 444, 104 N. W. 726.

60. See Schmid v. Benzie Circuit Judge, 138 Mich. 452, 101 N. W. 620; 1 Cyc. 752, 754.

CHAPTER IX.

RIGHTS AND DUTIES AFTER PERFECTION OF LIEN.*

§ 69. Security, Effect of Lien as.
70. Extent of the Lien When Claimed.
71. Duties of Lien Claimant After Lien Perfected, to Continue it in Force.

§ 69. Security, Effect of Lien as.

By perfection of the lien the claimant acquires security for his debt in the nature of a mortgage lien[1] which, by express provision of the statute, is limited in duration to one year from the date of filing the claim of lien in the office of the register of deeds, and no longer unless proceedings to enforce the lien have been commenced within the year.[2] By statute it is provided that the filing of claim of lien shall have the same effect as to notice as against subsequent purchasers or incumbrancers as the recording of a mortgage,[3] though to continue its force as to third persons after proceedings to foreclose are instituted, a *lis pendens* must be filed.[4]

*In general as to the subjects comprehended in Chapter IX, see Title "Mechanics' Liens," 34 Cent. Dig. §§280-308 and 13 Dec. Dig. §§159-179.

1. Willard v. Magoon, 30 Mich. 273 (276). See first paragraph or subdivision of §9 of the act; C. L. 1915 (14804), How. 2nd Ed. §13774, C. L. 1897 (10718). Hammond v. Wells, 45 Mich. 11 (13), 7 N. W. 218; Kirkwood v. Hoxie, 95 Mich. 62 (65), 54 N. W. 720.

2. §9 of Act 179 of 1891 as amended by Act 199 of 1893 and act 143 of 1897, C. L. 1915 (14804), How. 2nd Ed. §13774, C. L. 1897 (10718).

3. §5 of Act 179 of 1891, C. L. 1915 (14800), How. 2nd Ed. §13770, C. L. 1897 (10714); Gibbs v. Hanchette, 90 Mich. 657 (659), 51 N. W. 691.

4. §10 of Act 179 of 1891, C. L. 1915 (14805), How. 2nd Ed. §13775, C. L. 1897 (10719).

§ 70. Extent of the Lien When Claimed.

The lien is of course limited by the claim[5] and in the absence of exceptional circumstances to the interest of the person contracting for the construction or improvement, in the premises.[6] The statutory extent of the lien is fixed as being that the liens for such labor or materials furnished, including those for additions, repairs, and betterments, shall attach to the building, machinery, erections, structure, or improvement for which they are furnished or done, and to the lands on which constructed or installed, subject to any prior recorded title, claim, lien, incumbrance, or mortgage to or upon the land upon which such building, or buildings, machinery, erection, structure or improvement belongs or is put.[7] Where the person contracting for the construction or improvement had no title to the land on which such construction or improvement was to be made, the lien for work or materials for a new structure would extend merely to the structure.[8] Once the lien has attached the general rule

5. 27 Cyc. 223.

6. Wagar v. Briscoe, 38 Mich. 587 (594-596); Scales v. Griffin, 2 Doug. 54 (64-65); Merrill v. Brant, 175 Mich. 182 (184-185), 141 N. W. 550; Peninsular Electric Co. v. Norris, 100 Mich. 496 (504-505), 59 N. W. 151.

7. Fourth paragraph or subdivision of §9 of Act 179 of 1891, as amended by Act 199 of 1893 and Act 143 of 1897; C. L. 1915 (14804), How. 2nd Ed. §13774, C. L. 1897 (10718). Previous to the amendment of 1897 this section permitted a new building to be sold separately from the land where the land was not subject to lien through being a homestead, the contract not having been signed by the wife. Jossman v. Rice, 121 Mich. 270 (277-278), 80 N. W. 25; the amendment to paragraph 4 of the section in 1897 modified the ruling in Peninsular Electric Co. v. Norris, 100 Mich. 496 (502), 59 N. W. 151 (decided in 1894).

8. §3 of Act 179 of 1891, C. L. 1915 (14798), How. 2nd Ed. §13768, C. L. 1897 (10712). Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578 (579), 132 N. W. 117; Fuller v. Detroit Loan & Building Ass'n, 119 Mich. 71 (73-74), 77 N. W. 642. Where a new house was built upon land to which the contractee owner had no legal title but which constituted a homestead and was hence exempt from lien because the owner's wife did not sign the contract, the lien was held to have attached to the building separately and to be enforceable by sale and removal of the house. Holliday v. Mathewson, 146 Mich. 336 (338-340), 109 N. W. 669. Where the land is imperfectly described, but the building is accurately de-

is that the subsequent removal or destruction of the building by fire or other casualty does not terminate the lien against the land.[9]

§ 71. Duties of Lien Claimant After Lien Perfected, to Continue it in Force.

The lien claimant must, within five days after demand by the owner, part owner or lessee or his agent, furnish to the party making the demand a written statement of the amount of work and materials furnished to the date of his statement and then unpaid, as nearly as can then be ascertained, under penalty of a forfeiture of his lien.[10] He must begin suit in chancery to enforce or foreclose his lien within one year after the statement of account is filed in the office

scribed, the lien will perhaps stand against the building alone. Hannah & Lay Co. v. Mosser, 105 Mich. 18 (31), 62 N. W. 1120. This decision was reached, however, by virtue of the fourth paragraph of §9, which was later amended (in 1897) to its present form.

9. Ordinarily a mechanics' lien is not lost where the improvement giving rise to it is destroyed or removed, but in the absence of special conditions the lien still continues as to the real estate. Paddock v. Stout, 121 Ill. 571 (581), 13 N. E. 182; Smith v. Newbaur, 144 Ind. 95 (101-102, 104-105), 42 N. E. 40, 1094; Clark v. Parker, 68 Iowa 509, 12 N. W. 553; Freeman v. Carson, 27 Minn. 516; Stuart v. Broome, 59 Texas 466; Hooven, Owens & Rentschler Co. v. John Featherstone's Sons, 111 Fed. 81 (96); 27 Cyc. 286-287; Wilkinson on Mechanics' Liens, pp. 32-33; Rockel on Mechanics' Liens, §186; Jones on Liens, 3rd Ed. §§1538-1541, 1518; Boisot on Mechanics' Liens, §177; Houck Law of Liens, §§203-205; Kneeland on Mechanics' Liens, 2nd Ed. §§155-160; Overton on Liens, §549; Notes, 2 Am. & Eng. Ann. Cas. 812-813; 26 Id. 943-944; 34 Id. 681-682; 41 L. R. A. (N. S.) 296-302. Where a lien has attached to a building it has been held that such lien will not be defeated by the removal of the building to another lot. Bishop v. Honey, 34 Texas 245. Lien has also been held to attach to the proceeds of a sale of machinery originally subject to lien, in Paddock v. Stout, 121 Ill. 571 (581), 13 N. E. 182; but not to the proceeds of an insurance policy in favor of the owner or prior mortgagee. Rackley v. Scott, 61 N. H. 140; Elgin Lumber Co. v. Langman, 23 Ill. App. 250; Cameron v. Fay, 55 Texas 58 (62).

10. §8 of Act 179 of 1891, C. L. 1915 (14803), How. 2nd Ed. §13773, C. L. 1897 (10717). This requirement is after demand mandatory, and loss of lien results from non-compliance therewith although the owner is not prejudiced. Frohlich v. Beecher, 139 Mich. 278 (279-280), 102 N. W. 736; though where the demand was not made until after the bill

of the register of deeds.[11] He must, to continue his lien in force as notice to third persons, pending proceedings to enforce, file notice of *lis pendens* for record in the office of the register of deeds.[12]

to enforce lien was filed and process served upon defendant, it was held that the claimant did not lose his lien, although he failed to comply with such demand. Rohde v. Weinberg, 156 Mich. 318, 120 N. W. 789.

11. §9 of Act 179 of 1891 as amended by Act 199 of 1893 and Act 143 of 1897; C. L. 1915 (14804), How. 2nd Ed. §13774, C. L. 1897 (10718).

12. §10 of Act 179 of 1891; C. L. 1915 (14805), How. 2nd Ed. §13775, C. L. 1897 (10719).

CHAPTER X.

ASSIGNMENT, WAIVER, ESTOPPEL OR RELINQUISHMENT OF LIEN OR THE RIGHT TO CLAIM LIEN, AND PROCEEDINGS TO DISCHARGE LIEN.*

§ 72. Assignment.
73. Waiver Estoppel or Relinquishment of Rights by Claimant.
74. Waiver by Owner; as Affecting Rights of Third Persons.
75. Discharge and Release of Liens; In General.
76. Discharge and Release of Liens; by Owner Giving Bond.
77. Discharge and Release of Liens; by Affidavit of Owner Showing Lapse of Time and No Proceedings Begun.
78. Bond to Discharge and Vacate Lien.
79. Certificate by Clerk That Bond Has Been Filed to Discharge and Vacate Mechanics' Lien.
80. Affidavit to Obtain Certificate for Discharge of Mechanics' Lien.
81. Certificate of Clerk, Showing Non-Commencement of Proceedings to Enforce Mechanics' Lien.
82. Release or Discharge of Lien.

§ 72. Assignment.

Not only the debt for which lien may be claimed but also the lien and the right to enforce it may be assigned, and they would probably be held subject to assignment to the time of payment. The statutory provision is: All liens

*In general as to the subjects comprehended in Chapter X, see Title "Mechanics' Liens," 34 Cent. Dig. §§375-380, 381-403, 404-411 and 13 Dec. Dig. §§202-206, 207-217, 218-229.

or claims for liens which may arise or accrue under the terms of this act shall be assignable, and proceedings to enforce such liens may be maintained by and in the name of the assignees, who shall have as full and ample power to enforce the same as if such proceedings were taken under the provisions of this act by and in the name of the lien claimants themselves.[1]

§ 73. Waiver, Estoppel or Relinquishment of Rights by Claimant.

The right to a lien may be waived[2] by any sufficient agreement to which the person against whom the waiver is claimed is a party; thus, if the original contract provides that no lien shall attach, that provision would constitute a

1. §25 of Act 179 of 1891; C. L. 1915 (14820), How. 2nd Ed. §13790, C. L. 1897 (10734); 27 Cyc. 255-261. The right to enforce a lien is assignable. Gardner v. LeFevre, 180 Mich. 219 (221), 146 N. W. 653. The account may be assigned before the lien is claimed. McAllister v. Des Rochers, 132 Mich. 381 (383), 93 N. W. 887. After an assignment of an account against an owner, the assignor went into bankruptcy. Later the owner settled with the assignor's trustee in bankruptcy, without knowledge of the assignment of the account. It was held the settlement with the assignor's trustee could not affect the assignee's right to lien. Kudner v. Bath, 135 Mich. 241, 97 N. W. 865. Assignment to an attorney for the purpose of collection, to avoid expense and multiplicity of suits, is permissible. Smedley v. Dregge, 101 Mich. 200, 59 N. W. 411. Assignment by a contractor to a third person of money to become due on the contract, with notice to the land owner of the assignment, will not deprive a subcontractor of his lien. Bourget v. Donaldson, 83 Mich. 478 (485-486), 47 N. W. 326. But if the money due to the contractor had actually been paid over by the owner to such third person, on the order of the contractor, the lien claimants would have lost all claim to the money so paid. Id. p. 486. Notwithstanding claims of lien have been filed, the contractor's assignee may bring action against the owner upon the contract where all liens filed have been assigned to him and the time for filing other liens has expired. Cady v. Fairplain Literary Ass'n, 135 Mich. 295, 97 N. W. 680. Upon the general subject of the assignability and assignment of liens and right to claim lien, see: Jones on Liens, 3rd Ed. §§1393a, 1493-1499; Rockel on Mechanics' Liens, §§165-167; Boisot on Mechanics' Liens, §§9-12, 259-260, 524; Phillips on Mechanics' Liens, 3rd Ed. §§54-56; Kneeland on Mechanics' Liens, 2nd Ed. §§7-9. As to right of assignee of lienable claim to acquire lien, see Notes, 21 Am. & Eng. Ann. Cas. 962-964; 37 Id. 1119. See Form No. 17, Part Three.

2. Waiver, release, discharge, and loss of right to lien. In general: Jones on Liens, 3rd Ed. §§1500-1552; Rockel on Mechanics'

waiver as to the parties expressly assenting to the provision, though not as to subcontractors and materialmen or laborers who did not assent.[3] Waiver may result from conduct as

Liens, §§173-195, 208; Boisot on Mechanics' Liens, §§588, 705-758; Phillips on Mechanics' Liens, 3rd Ed. §§272-286; 27 Cyc. 261-276, 276-278, 331-332. By agreement. Jones on Liens, 3rd Ed. §§1500a-1505; Rockel on Mechanics' Liens, §173; Boisot on Mechanics' Liens, §§732, 744-748; Phillips on Mechanics' Liens, 3rd Ed. §§117, 272; Kneeland on Mechanics' Liens, 2nd Ed. §§134-138. By conduct, estoppel, etc. Jones on Liens, 3rd Ed. §1507; Rockel on Mechanics' Liens, §§175, 180, 186; Boisot on Mechanics' Liens, §§586-587, 718; Phillips on Mechanics' Liens, 3rd Ed. §§273-273a; Houck on Law of Liens, §217; Kneeland on Mechanics' Liens, 2nd Ed. §146; 27 Cyc. 276-278. By taking mortgage on same property: Boisot on Mechanics' Liens, §717; Rockel on Mechanics' Liens, 3rd Ed. §179; Barrows v. Baughman, 9 Mich. 213 (217). By abandonment of contract and refusal to complete structure: Jones on Liens, 3rd Ed. §§1512-1513, 1516. By taking judgment upon personal liability. Rockel on Mechanics' Liens, §174; Boisot on Mechanics' Liens, §709; Note, 32 L. R. A. (N. S.) 1073. By electing and pursuing another remedy. As to right to pursue other remedies simultaneously, see: Note, 3 Am. & Eng. Ann. Cas. 1100. By taking notes or collateral security: Jones on Liens, 3rd Ed., §§1519-1537; Rockel on Mechanics' Liens, §§176-179; Boisot on Mechanics' Liens, §§710-713, 714-716; Phillips on Mechanics' Liens, 3rd Ed. §§274-279, 283, 285; Houck on Law of Liens, §§190-202; Kneeland on Mechanics' Liens, 2nd Ed. §§139-140, 141; Overton on Liens, §§569, 574. By taking an unsecured note. Note, 35 Am. & Eng. Ann. Cas. 961-968; 35 L. R. A. (N S.) 93; 27 Cyc. 267. But if notes are expressly accepted in payment, with intent to waive lien, the lien would be thereby discharged. Jones on Liens, 3rd Ed. §1537. The taking of notes not due until after the period of enforcement is past has been held to constitute a waiver. Jones on Liens, 3rd Ed. §§1535-1538; Rockel on Mechanics' Liens, §177; Phillips on Mechanics' Liens, 3rd Ed. §§281-282; Kneeland on Mechanics' Liens, 2nd Ed. §§144-145. The Michigan rule is however fixed by statute. See §26 of Michigan Law, C. L. 1915 (14-821), How. 2nd Ed. §13791, C. L. 1897 (10735); also Smalley v. Ashland Brown-Stone Co., 114 Mich. 104 (106), 72 N. W. 29. By extension of credit: Note, 20 Am. & Eng. Ann. Cas. 522-523. By contract inconsistent with lien: Note, 1 Am. & Eng. Ann. Cas. 954-955. Tender is generally held to discharge lien: Note, 23 Am. & Eng. Ann. Cas. 932. Tender to be availed of should be pleaded. Palmer v. McGuinness, 127 Ia. 121, 102 N. W. 802. By release or payment: Rockel on Mechanics' Liens, §§189-195; Boisot on Mechanics' Liens, §§735-743; Houck on Law of Liens, §189; Phillips on Mechanics' Liens, 3rd Ed. §§286, 287 et seq. Waiver or discharge in general by owner's bond: Boisot on Mechanics' Liens, §§756-758; Phillips on Mechanics' Liens, 3rd Ed. §§295-304. By taking bond or deposit with intent to waive. Rockel on Mechanics' Liens, §§182-185; Boisot on Mechanics' Liens, §§750-755; Phillips on Mechanics' Liens, 3rd Ed. §274.

3. See Smalley v. Gearing, 121 Mich. 190 (198), 79 N. W. 1114, 80 N. W. 797.

well as from contract and such conduct may amount to an estoppel. In either case it should be clearly made out.[4] A right to lien once waived may not, in the absence of express agreement to that effect with the owner, be afterwards revived.[5] The burden of proving a waiver or loss of lien is upon the party asserting it.[6]

§ 74. Waiver by Owner; as Affecting Rights of Third Persons.

While the owner may perhaps, so far as he is personally concerned, waive compliance with statutory provisions for

4. See §43-49; Marquette Lumber Co. v. Albee, —— Mich. ——, 162 N. W. 1005, 1006. It was held that the right to lien was waived where the materialman took a note not due until after the period for filing lien had expired and a third person had acquired the property; and also that refusal to accept payment when tendered operated as a waiver. Blakeley v. Moshier, 94 Mich. 299 (303), 54 N. W. 54. See however, Smalley v. Ashland Brown-Stone Co., 114 Mich. 104 (106-107), 72 N. W. 29; Delaney Forge & Iron Co. v. The Winnebago, 142 Mich. 84 (91), 105 N. W. 527; Sarmiento v. The Catherine C, 110 Mich. 120 (125-126), 67 N. W. 1085; 27 Cyc. 262. A subcontractor, by guaranteeing performance of a building contract and directing payments to be made to the principal contractor, has been held to have waived his right to lien and to have estopped himself from claiming a lien upon the building, which was abandoned by the contractor and completed by the owner, at least until other lienors had been paid. Frohlich v. Ashton, 164 Mich. 132 (133-134), 129 N. W. 18. A subcontractor was held to have been estopped to assert his lien as to payments made by the owner to the contractor at such subcontractor's request. Fairbairn v. Moody, 116 Mich. 61 (62-63), 74 N. W. 386, 75 N. W. 469. A contractor was held not to be foreclosed from recovering for items of extras wrongfully charged to him because he did not formally ask credit for them. Malcomson-Houghten Co. v. Gregorian Building Co., 191 Mich. 678, 158 N. W. 126, 23 D. L. N. 405 (408). Where claimant's book account against the contractor contained other charges than those relating to the building in question, this was held not sufficient of itself to show claimant had waived his right to a lien. Union Trust Co. v. Casserly, 127 Mich. 183 (185), 86 N. W. 545. By electing to enforce its lien in an attempt which proved unsuccessful, plaintiff did not waive its right to claim title under its reservation of the same. Warner Elevator Mfg. Co. v. Capitol Investment Etc. Ass'n, 127 Mich. 323 (326-327), 86 N. W. 828. A right to lien was held waived where the claimant provided in his contract for a mortgage upon the same land to which the lien was claimed to attach. Barrows v. Baughman, 9 Mich. 213 (217).

5. Blakeley v. Moshier, 94 Mich. 299 (303), 54 N. W. 54; Au Sable River Boom Co. v. Sanborn, 36 Mich. 358 (363).

6. Perkins v. The Golden Girl, 185 Mich. 200 (212), 151 N. W.

his protection, he cannot by contract or conduct waive compliance with the substantial requirements of the statute so as to affect, limit or cut off the rights of third persons[7] or so as to give to lien claimants a preference as against third persons which they have not acquired by perfection of liens in the prescribed manner.[8] The waiver by the owner of the provisions of the statute for his protection can only be under circumstances amounting to an estoppel.[9] Acquiescence by the owner in the continuation of work beyond the period specified in the contract may amount to a waiver of his right to insist that the time of completion was of the essence of the contract.[10]

§ 75. Discharge and Release of Liens; In General.

Payment entitles the owner of property or any interest therein subjected to a lien, to a discharge.[11] The statu-

660; Marquette Lumber Co. v. Albee, —— Mich. ——, 162 N. W. 1005, 1006; 26 Cyc. 791.

7. Smalley v. Gearing, 121 Mich. 190 (198), 79 N. W. 1114, 80 N. W. 797.

8. Parties to a lien proceeding cannot by stipulation, affect any rights but their own. Pittsburgh Plate Glass Co. v. Charles Klein Co., 177 Mich. 399 (405), 140 N. W. 484. The attempt of an owner to waive service of statement required of the contractor under §4 as prerequisite to suit to enforce lien will not be effectual as against a mortgagee or another lienor. Dittmer v. Bath, 117 Mich. 571 (573), 76 N. W. 89; Wiltsie v. Harvey, 114 Mich. 131 (134), 72, N. W. 134; Adams v. Central City Granite Etc. Co., 154 Mich. 448 (458), 117 N. W. 932. The rights of a garnishing creditor of a contractor cannot be postponed by the consent of the wife of the owner to the entry of a decree establishing a lien, where she did not sign the contract for improving land owned by herself and husband jointly. McMillin v. Schneider, 147 Mich. 258 (264), 110 N. W. 961.

9. Sterner v. Haas, 108 Mich. 488 (489), 66 N. W. 348. See Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111 (113), 82 N. W. 801.

10. Barnard v. McLeod, 114 Mich. 73 (74-75), 72 N. W. 24. Where the owner waived his right to insist upon the completion of the contract on the date stipulated, he was held not entitled to recoup his damages for loss of rent due to the delay. Kotcher v. Perrin, 149 Mich. 690 (692), 113 N. W. 284. Under the old code of 1833, it was held that knowledge by the owner of the erection of a building upon his land by the vendee who had contracted to purchase the same but who later suffered it to revert to such owner, was not such acquiescence as would subject his title to lien. Scales v. Griffin, 2 Doug. 54 (60-66).

11. 27 Cyc. 294; Rockel on Mechanics' Liens, §§189, 191; Boisot on Mechanics' Liens, §§735-743.

tory provision in respect thereto is as follows: When the debt secured by such lien is fully paid, the lien holder shall execute to such owner, part owner or lessee, or other person having an interest or title in the lands, building, machinery, structure, or improvements affected by such lien, a discharge as in case of a discharge of a mortgage, or shall indorse such discharge on such claim of lien filed, and upon refusal to do so on demand, shall be subject to like penalties as are provided by law for refusal to discharge mortgages which have been fully paid.[12] While payment of the debt releases the liens of those paid, payments to contractors do not release the liens of those entitled but not paid.[13] A proper tender of a sufficient amount has been held to release a lien.[14] A lien may at any time, by agreement based upon proper consideration, be released as to the parties so contracting. The release may be executed before the completion and during progress of the work. It should however be delivered to or for the use of the owner or other person for whom intended and show to whom it is made.[15]

§ 76. Discharge and Release of Liens; by Owner Giving Bond.

The giving of a proper bond entitles the owner of property or any interest therein upon which liens have been claimed to a discharge of the lien of any contractor, subcontractor, materialman or laborer. The statutory provision in that regard being substantially as follows: The lien of any contractor, subcontractor, materialman or lab-

12. §23 of Act 179 of 1891, C. L. 1915 (14818), How. 2nd Ed. §13788, C. L. 1897 (10732); 27 Cyc. 304. See Form No. 10, in Appendix.

13. See §40; 27 Cyc. 294-304. Effect of owner's paying contractor in full on enforceability of lien of subcontractor, etc. Notes, 26 Am. & Eng Ann. Cas. 405-406; 20 L. R. A. 560-565.

14. See Moynahan v. Moore, 9 Mich. 9. Refusal by a claimant to accept payment when tendered may under proper circumstances operate as a release or waiver of his lien. Blakeley v. Moshier, 94 Mich. 299 (303), 54 N. W. 54; Wilkinson on Mechanics' Liens, p. 102.

15. 27 Cyc. 292-294.

orer may, at any time, be vacated and discharged if the owner, part owner or lessee or contractor, shall give to each of such persons whose liens are to be discharged, and file with the clerk of the circuit court for the county in which such property is situated, a good and sufficient bond in the penal sum of twice the amount for which the lien is claimed, with two or more sureties to be approved by the said clerk, conditioned for the payment of any sum for which the obligee in such bond may obtain judgment or decree upon the demand for which such statement of account was filed, which sureties shall justify their responsibility before such clerk or a circuit court commissioner, under oath, and shall severally testify that they are each worth in real estate in the county in which such property is situated, over and above all exemptions, incumbrances, debts and other liabilities, the penal sum of said bond, each of which justifications shall be endorsed in full on said bond. The clerk on receiving such bond shall within ten days serve notice upon all persons claiming a lien upon said premises of the fact of the filing of such bond, stating the amount and the names of the sureties thereon. The lien holders or claimants have ten days after the service upon them of the notice within which to file objections to the sureties on the bond, and in case objections to the sufficiency of sureties is filed with the said clerk within ten days, the clerk shall not approve the bond until after the sureties have appeared before him and answered under oath such questions as may be put to them by or on behalf of the lien holder or claimant touching their financial responsibility. If no objections to the sufficiency of the sureties upon such bond are filed in the ten days, or if, after the examination of the sureties under oath as herein provided, the county clerk approves the bond, the clerk shall at once give to the obligee named therein a certificate that a good and sufficient bond has been filed with him as required by law and shall state the names of the obligor and obligee, the amount of the bond and de-

scription of the property covered by the lien thereby discharged. Upon the filing of this certificate in the office of the register of deeds, the lien of the obligee therein named, if of record, shall be discharged.[16]

§ 77. Discharge and Release of Liens; by Affidavit of Owner Showing Lapse of Time and No Proceedings Begun.

The lapse of one year's time from the date of filing of the statement of lien in the office of the Register of Deeds,—no proceedings to enforce having been commenced in the meantime,—entitles the owner or his agent or attorney to make and present to the register of the court an affidavit setting forth certain material facts enumerated in the statute, whereupon it becomes the duty of the register, if his record indicates that no such proceeding has been commenced within the time limited by law, to certify the facts under his hand and the seal of the court, which certificate, when filed with the register of deeds, operates to terminate the lien. The statutory provisions in that regard are substantially as follows: Whenever any statement has been filed in the office of any register of deeds claiming a lien upon any real estate by any mechanic or other person, under Act 179 of 1891 as amended, and the time within which proceedings should be commenced to enforce the same has elapsed, and no such proceedings have been commenced, the owner of said real estate or of any interest therein, his agent or attorney, may make and present to the register of the court in which such proceedings might have been taken, an affidavit showing the time when such statement claiming lien has been filed and the names of the parties thereto, and thereupon it shall be the duty of such register to examine

16. §7 of Act 179 of 1891, as amended by Act 143 of 1897, C. L. 1915 (14802), How. 2nd Ed. §13772, C. L. 1897 (10716); 27 Cyc. 278-284; Wilkinson on Mechanics' Liens, pp. 103-106. The provision in this section, permitting the giving of bond, is valid. McHugh v. Gault, 86 Mich. 135, 48 N. W. 869. See Forms No. 6 and 7, in Appendix.

the records in his office, and if it appears upon such examination that no such proceedings have been commenced within the time required by law, such register shall execute and deliver to such owner or part owner a certificate of such fact under his hand and the seal of said court. The register of deeds, on receipt of such certificate and payment to him of twenty-five cents, shall file and preserve the same, and make an abstract thereof in the book kept by him for the purpose of entering claims of lien; and shall mark on the record containing the abstract of such statement of lien "discharged by certificate of register of said court," naming it, with the date of filing such certificate, and thereafter the effect of such lien shall cease.[17] The provisions of this act also applied where claim of lien was filed under former statutes and where rights thereunder had been saved in accordance with Section 31 of said Act 179 of 1891, in any case where the time within which proceedings should have been commenced according to the terms of the statute under which claim of lien was filed, had elapsed.[18] It is not essential that liens of record should be discharged before suit at law to recover the debt is commenced; payment of the balance either before or after judgment entitles the defendant to discharge.[19]

§ 78. Bond to Discharge and Vacate Lien.

Section 7 of Lien Law, C. L. 1915 (14802), Supra § 76.

KNOW ALL MEN BY THESE PRESENTS, That we —— as principal and —— and —— as sureties, all of the —— of —— County of —— Michigan, are held and firmly bound unto —— in the sum of —— dollars,[20] lawful money of the United States of America, to be paid to the

17. §1 of Act 172 of 1893, C. L. 1915 (11787), How. 2nd Ed. §13797, C. L. 1897 (9055). See Forms Nos. 8 and 9, in Appendix.

18. §2 of Act 172 of 1893, C. L. 1915 (11788), How. 2nd Ed. §13798, C. L. 1897 (9056).

19. Cady v. Fairplains Literary Ass'n, 135 Mich. 295 (297), 97 N. W. 680. See §23 of Act 179 of 1891, C. L. 1915 (14818), How. 2nd Ed. §13788, C. L. 1897 (10732).

20. The penal sum named in the

said —— or to —— certain attorneys, heirs, executors, administrators or assigns —— to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, and each and every of them, firmly by these presents.

Sealed with our seals, dated this —— day of —— A. D. 19—.

Whereas, the said —— heretofore, to-wit: on the —— day of —— A. D. 19— filed in the office of the Register of Deeds for the County of ——, State of Michigan, a statement of account, verified by affidavit, of a demand which —— claimed to be due to —— and for which —— claimed a lien upon the following described property, to-wit: —— of which property the above bounden principal is ——.

NOW, THEREFORE, the condition of this obligation is such, that if the above bounden principal shall pay or cause to be paid to the above named obligee —— any sum for which said obligee —— may obtain judgment or decree upon the demand for which such statement of account was filed, then this obligation to be void, otherwise to remain in full force and virtue.

——————(L. S.)

——————(L. S.)

——————(L. S.)

Signed, sealed and delivered
in presence of

———————————

———————————

STATE OF MICHIGAN, } ss.
COUNTY OF ——. }

—— of the —— of —— in said County of ——, one of the sureties named in and who signed the within and foregoing bond, being duly sworn deposes and says that

bond must be at least twice the amount for which lien is claimed.

he is worth in real estate situated in said County of —— the sum of —— dollars, over and above all exemptions, encumbrances, debts and other liabilities.

_____.[21]

Subscribed and sworn to before me this —— day of —— A. D. 19—.

_____.

—— County, Michigan.

_____.[22]

§ 79. Certificate by Clerk That Bond Has Been Filed to Discharge and Vacate Mechanics' Lien.

Section 7 of Lien Law, C. L. 1915 (14802), Supra 76.

STATE OF MICHIGAN, }
COUNTY OF ——. } ss.

I, ——, Clerk of the Circuit Court for said County, do hereby certify that on the —— day of —— A. D. ——, the —— of the following described premises —— as obligor filed, as permitted by law, a good and sufficient bond in the sum of —— dollars, to —— as obligee conditioned for the payment of any sum for which the said obligee—— may obtain judgment or decree upon the demand for which said obligee —— heretofore, to-wit: on the —— day of—— A. D. —— filed a statement of account and lien, claiming therein a lien upon said property; that on the —— day of —— A. D. 19—, I served a notice upon all the persons claiming a lien upon said property of the fact of the filing of such bond, stating the amount thereof and naming the sureties thereon as required by law, and that no objections to the sufficiency of the sureties upon such bond have been filed.[23]

21. Two or more sureties must justify.

22. The sureties shall justify before the clerk of the circuit court or a circuit court commissioner, in the county in which the property is situated.

23. If objections were filed, examination had and the bond thereafter approved, vary the certificate accordingly.

Dated this —— day of —— A. D. ——.

————————, Clerk.[24]

§ 80. Affidavit to Obtain Certificate for Discharge of Mechanics' Lien.

Act 172 of 1893, C. L. 1915 (11787-11788), Supra § 77.

THE CIRCUIT COURT FOR THE COUNTY OF ——
IN CHANCERY.

STATE OF MICHIGAN, } ss.
COUNTY OF ——. }

—— of the —— of —— in said County being duly sworn, says that he is[25] —— the owner —— of the following described premises situated in —— said County, to wit: ——; that on the —— day of ——, A. D. 19—, at —— o'clock ——M., there was filed with the Register of Deeds in and for said County of —— the Statement of Account and Lien of —— in which a Lien was claimed in h—— favor, against —— for the amount of —— dollars, upon the above described propery, for[26] —— in accordance with Act 179, of the Session Laws of 1891, of the State of Michigan, as amended (C. L. 1915, §§ 14796-14826).

That no proceedings have been commenced to enforce said Lien, and that the time has elapsed within which proceeding should be commenced to enforce such Lien, and that this affidavit is made pursuant to statute for the purpose of obtaining a certificate of discharge of said Lien, as provided by law; and further this deponent says not.

---

24. The statute (C. L. 1915 §14802) provides that, upon the filing of this certificate in the office of the register of deeds, the lien of the obligee, if of record, shall be discharged.

25. Nothing need be inserted in this space if the affiant makes the affidavit in his own behalf. If the affidavit is made on behalf of others, insert the following: "the attorney" (or "agent") "of —— and that he makes this affidavit for and on —h—— behalf and has knowledge of the facts herein set forth."

26. In this space there may be inserted a brief statement of what the lien was claimed for (as shown by original statement on file) whether labor or materials, or both, for erecting or improving a building, etc.

Subscribed and sworn to before me, this —— day of —— A. D. 19—.

Notary Public, —— County, Michigan.
My commission expires ——.

§ 81. Certificate of Clerk, Showing Non-Commencement of Proceedings to Enforce Mechanics' Lien.

Act 172 of 1893, C. L. 1915 (11787-11788), Supra § 77.

THE CIRCUIT COURT FOR THE COUNTY OF[1] ——
IN CHANCERY.

STATE OF MICHIGAN, } ss.
COUNTY OF ——. }

I, —— Clerk of the Circuit Court for the County of——, do hereby certify that on the —— day of —— A. D. ——, there was presented to me, and duly filed with me, the said Clerk, the affidavit of[27] —— setting forth that —— h—— —— the owner —— of the following described premises, situated in the —— of —— in said County, to wit: —— and that on the —— day of —— A. D. ——, at —— o'clock —— M., there was filed with the Register of Deeds in and for said County of —— the Statement of Account and Lien of —— in which a Lien was claimed in —— h—— favor against —— for the amount of —— Dollars, upon the above described property for[28] —— in accordance with Act 179 of the Session Laws of 1891, of the State of Michigan, as amended (C. L. 1915, §§ 14796-14826); that no proceedings have been commenced to enforce said Lien, and that the time has elapsed within which proceedings

27. In this space, if the affiant is also the owner of the premises, simply set forth his name, and after the words "setting forth that" insert the words "he is." If the affidavit is made on behalf of others, insert in the above space the following: "the attorney (or agent) of —— for and on whose behalf the said affidavit purports to have been made."

28. In this space insert brief statement of what the lien was claimed for (as shown by the affidavit), whether for labor or materials or both, for erecting or improving a building, etc. This may not be strictly necessary, but it is thought best to do so.

should be commenced to enforce such Lien, and that said affidavit is made for the purpose of obtaining a Certificate for the discharge of said Lien, as provided by law.

And, I the said Clerk, do further certify that I have made a careful examination and search of the records in my office, and that it appears from such examination that no such proceedings for the enforcement of said Lien have been commenced in said Court.[29]

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, (SEAL) at —— in said County, this —— day of —— A. D. ——.

————————, Clerk.

§ 82. Release or Discharge of Lien.

Section 23 of Lien Law, C. L. 1915 (14818), Supra § 75.

KNOW ALL MEN BY THESE PRESENTS, that —— of the —— of —— and State of —— do —— hereby certify that the Mechanics' Lien heretofore filed by —— on the —— day of —— A. D. one thousand nine hundred and —— in the office of the Register of Deeds for the County of —— and State of ——, being Lien Number —— for $—— against the following described premises, of which premises —— is the owner, viz.: —— is fully paid, satisfied and discharged.

IN WITNESS WHEREOF, —— have hereunto set —— hand —— and seal —— the —— day of ——, One thousand nine hundred and ——.

———————— (L. S.)

Signed, sealed and delivered in presence of

————————————

————————————

29. If proceedings have been commenced for enforcement of lien, but not within the time required by law, state when such proceedings were commenced, and that they were not commenced within the year limited by law.

STATE OF MICHIGAN, }
COUNTY OF ——. } ss.

On this —— day of —— in the year One thousand nine hundred and —— before me, a —— in and for said County, personally came the above named ——, known to me to be the person —— named in and who executed the above instrument, and acknowledged that —— executed the same for the intents and purposes therein mentioned.

Notary Public, —— County, Michigan.
My commission expires ——.

CHAPTER XI.

PRIORITIES AND SUBROGATION.*

§ 83. Priorities.
84. Subrogation.

§ 83. Priorities.

The filing of a claim of lien has the same effect as to notice as against subsequent purchasers or incumbrancers as has the recording of a mortgage.[1] The lien takes precedence of all transfers, mortgages, titles, attachments, garnishments and other claims, created or arising subsequent to the commencement of work upon the structure or improvement but is secondary to all interests in the title created and perfected before the contract for the improvement or structure or, as some cases hold, before the commencement of work thereon.[2] The statutory provisions in this regard

*In general as to the subjects comprehended in Chapter XI, see Title, "Mechanics' Liens," 34 Cent. Dig. §§336-374, and 13 Dec. Dig. §§194-201.

1. §5 of Act 179 of 1891, C. L. 1915 (14800), How. 2nd Ed. §13770, C. L. 1897 (10714), Gibbs v. Hanchette, 90 Mich. 657 (659), 51 N. W. 691; Wilkinson on Mechanics' Liens, pp. 43-48; 27 Cyc. 230-252. See also §1, note 6.

2. §9 of Act 179 of 1891 as amended by Act 199 of 1893 and Act 143 of 1897, C. L. 1915 (14804), How. 2nd Ed. §13774, C. L. 1897 (10718); Gibbs v. Hanchette, 90 Mich. 657 (659), 51 N. W. 691. In determining priorities, liens attach as of the date of the actual commencement of the building or improvement, regardless of the time when, or person by whom, particular work is done or materials furnished, for which lien is claimed. Kay v. Towsley, 113 Mich. 281 (283), 71 N. W. 490 Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111 (114), 82 N. W. 801; 27 Cyc. 215-217, 246. See Sheldon, Kamm and Co. v. Bremer, 166 Mich. 578, 132 N. W. 117. The building is begun when the first permanent work is done on the land. Boisot on Mechanics' Liens, §56; 27 Cyc. 217. As to accrual of the right to lien and priority as dating from the commencement of work—when work commenced, see: Jones on Liens, 3rd Ed. §§1470-1483; Rockel on Mechanics' Liens, §148a; Boisot on Mechanics' Liens, §§53-64; Phillips on Mechanics' Liens, 3rd

are detailed and specific and are as follows:[3]

First, As between persons claiming liens under this statute, the several liens upon the same property attaching by reason of work, labor or materials furnished in carrying forward or completing the same building or buildings, machinery, structure or improvement, shall be deemed simultaneous mortgages.[4]

Second, They shall take priority to all garnishments for the contract debt made prior or subsequent to the commencement of the furnishing of the materials or performance of the labor without regard to the date of filing the claims for lien.[5]

Third, They shall be preferred to all other titles, liens, or incumbrances which may attach to or upon such building, machinery, structure or improvement, or to or upon the land upon which they are situated, which shall either be given or recorded subsequent to the commencement of said building or buildings, erection, structure or improvement.[6]

Fourth, The liens for such labor or materials furnished, including those for additions, repairs, and betterments, shall

Ed. §§215-224; Houck Law of Liens, §46; Overton on Liens, §544; 27 Cyc. 246, 244. As to priority as between lien claimant and assignee of contractor, see: Notes, 19 Am. & Eng. Ann. Cas. 438; 29 Id. 514; 27 Cyc. 231-234; as between lien and conveyance of the property, Note, 40 Am. & Eng. Ann. Cas. 616-625; as between lien and mortgage of the property, Note 40 Am. & Eng. Ann. Cas. 634-663; as to rights of judgment creditors, see: Boisot on Mechanics' Liens, §§335-339; Phillips on Mechanics' Liens, 3rd Ed. §§248-249; as to rights of purchasers of the property, see: Boisot on Mechanics' Liens, §§312-321.

3. Paragraphs *first, second, third* and *fourth* of the text are found in §9 of Act 179 of 1891 as amended by Act 199 of 1893, and Act 143 of 1897, C. L. 1915 (14804), How. 2nd Ed. §13774, C. L. 1897 (10718).

4. See 27 Cyc. 230.

5. The rights of a garnisheeing creditor of the contractor cannot be postponed by consent of wife to entry of decree establishing lien where she did not sign the contract for improving land owned by herself and her husband jointly. McMillan v. Schneider, 147 Mich. 258 (264), 110 N. W. 961.

6. The lien takes precedence of a mortgage executed after the actual commencement of the building, although the contract for furnishing the materials for which lien is claimed was not entered

attach to the buildings, machinery, erection, structure, or improvement for which they are furnished or done, subject to any prior recorded title, claim, lien, incumbrance, or mortgage to or upon the land upon which such building or buildings, machinery, erection, structure, or improvement belongs or is put.[7]

Fifth, When there are several attaching creditors they shall, as between themselves, be entitled to be paid according

into until after the mortgage was executed and recorded. Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111 (114), 82 N. W. 801. The attempt of the owner to waive service of statement required of contractor under section 4 as prerequisite to suit to enforce lien will not be effectual as against a mortgagee or another lienor. Dittmer v. Bath, 117 Mich. 571, 76 N. W. 89; Wiltsie v. Harvey, 114 Mich. 131, 72 N. W. 134; Adams v. Central City Granite Co., 154 Mich. 448 (458), 117 N. W. 932. To the effect that a lien is prior to a mortgage subsequently given or recorded, and in some states, so far as a new structure is concerned, prior to a previously given and recorded mortgage, see: Jones on Liens, 3rd Ed. §1460-1486a; Rockel on Mechanics' Liens, §§148a, 151, 155, 157-164; Boisot on Mechanics' Liens, §144, 149; Phillips on Mechanics' Liens, 3rd Ed. §§226-234; Overton on Mechanics' Liens, §540; 27 Cyc. 243-252. Mortgagees and others acquiring interests in property against which a lien is sought to be enforced, have a right to call for strict proof of all that is essential to the creation of the lien. Davis v. Alvord, 94 U. S. 545 (547). A mortgage given and recorded after preparation of plans and specifications but before commencement of the building or improvement is superior to a Mechanics' Lien arising out of the construction. So held where mortgage ran to the contractor who had given the owner a bond with penalty equal to the amount of mortgage. Stevens v. Garland, —— Mich. ——, 164 N. W. 516; J. W. McCausey & Co. v. Gittleman, 201 Mich. 8, 166 N. W. 896 (897-898). (See note 7 following.)

7. This paragraph (*fourth*) of Sec. 9 of the law previous to 1897, provided that such liens should attach to the building, etc., in preference to any prior title, mortgage, etc., upon the land. Under this provision it was held that a vendor's lien upon machinery furnished to the lessees of a mill was superior to the prior (recorded) lease given by them and was not defeated by the forfeiture of such prior lease, although the latter provided that all machinery added later to the mill should, on the forfeiture or other termination of the lease, remain in the mill as the property of the lessor. Marinette Iron Works Co. v. Cody, 108 Mich. 381 (383-9), 66 N. W. 334. This section (§9) of the law, and especially paragraph 4 thereof, was amended in 1897 (see Act 143 of 1897) to provide that such liens should attach subject to any prior recorded title, mortgage, etc., which provision constitutes the present law on the subject. A chattel mortgage upon structures and machinery erected upon leased land, given and perfected before the making of contract for certain improvements which would give rise to a right to a mechanics' lien, takes precedence over the

to the order of their respective attachments, but when several creditors who are entitled to the lien provided for in this act, have equal rights as between themselves, and the fund shall be insufficient to pay the whole, they shall share it equally in proportion to their respective claims.[8]

Sixth, If the claims against the estate are all ascertained at the time of ordering the sale, the court may at the same time order the officer to pay over and distribute the proceeds of the sale after deducting all lawful charges and expenses to and among the several creditors to the amount of their respective claims, if there is sufficient therefor; and if there is not sufficient, then to divide and distribute the same among the creditors in proportion to the amount due to each of them: *Provided,* that such original contractor shall be subrogated to the rights of his subcontractors, materialmen and laborers, who shall first be paid in full; and that the subcontractors shall be subrogated to the rights of their materialmen and laborers, who shall first be paid in full.[9]

mechanics' lien and its foreclosure eliminates said lien and vests the purchaser with the title in priority to the subsequently filed mechanics' lien. Presque Isle Sash & Door Co. v. Reichel, 179 Mich. 466 (474), 146 N. W. 231. A vendor's lien in materials or machinery furnished for construction, when title reserved, takes priority over mechanics' lien subsequently filed. Presque Isle Sash & Door Co. v. Reichel, 179 Mich. 466 (476), 146 N. W. 231. Where the lessee of real estate contracted for structures and improvements thereon and a subcontractor claimed a lien and instituted proceedings to enforce and it appeared that the lessor owner claimed a prior lien upon the interest of the lessee as security for a large indebtedness due him from the lessee, under his lease, which was made before, but not recorded until after complainant's contract had been performed, it was held that while the actual interest of the lessee in the building was subject to the lien of complainant, that lien did not cut off, or have priority over the lien of the lessor. Peninsular Electric Company v. Norris, 100 Mich. 496 (501), 59 N. W. 151. Under a former law bona fide purchasers were held protected against lien to the time of filing claim. Sisson v. Holcomb, 58 Mich. 634, 26 N. W. 155. To the effect that a lien is not prior to a mortgage recorded before the right to lien accrued by reason of beginning construction, see: Jones on Liens, 3rd Ed. §§1457-1460; Rockel on Mechanics' Liens §§148a, 155-164; Boisot on Mechanics' Liens, §§144-156, 322-334; Phillips on Mechanics' Liens, 3rd Ed. §§225, 232, 234-242; Houck Law of Liens, §§141-152; 27 Cyc. 236-243, 252-255; Stevens v. Garland, —— Mich. ——, 164 N. W. 516 (518); J. W. McCausey & Co. v. Gittleman, 201 Mich. 8, 166 N. W. 896 (897-898).

8. §20 of Act 179 of 1891, C. L. 1915 (14815), How. 2nd Ed. §13785, C. L. 1897 (10729).

9. §16 of Act 179 of 1891, C. L.

§ 84. Subrogation.

Any person holding a lien for labor or materials furnished upon any premises subject to any prior recorded lien, incumbrance or mortgage may pay off any such prior lien, incumbrance or mortgage, and shall thereupon be subrogated to all the rights of the prior holder of such lien, incumbrance or mortgage.[10] In case the property covered by the lien is held by the vendee in a land contract, and he surrenders or forfeits his rights thereunder, the person or persons holding such liens may be subrogated to the rights of such vendee, as his rights existed immediately before such surrender or forfeiture, by performing the covenants contained in such contract within thirty days after such forfeiture or surrender is made.[11] Where the claims are all ascertained when the sale is ordered, the court at the same time may order distribution of the proceeds of the sale, after deducting all lawful charges and expenses, among the several creditors to the amount of their respective claims, if there is sufficient surplus; if there is not sufficient surplus, then it shall be divided and distributed among the creditors in proportion to the amount due each; but with the proviso that the original contractor shall be subrogated to the rights of his subcontractors, materialmen and laborers, who shall first be paid in full, and that the subcontractors shall be subrogated to the rights of their materialmen and laborers, who shall first be paid in full.[12]

1915 (14811), How. 2nd Ed. §13781, C. L. 1897 (10725). Under this section materialmen and laborers are first entitled to be paid in full, then subcontractors in full, then the contractor. 27 Cyc. 231. See §§37 and 40 as to pro rata distribution.

10. §9 of Act 179 of 1891 as amended by Act 199 of 1893, and Act 143 of 1897, C. L. 1915 (14804), How. 2nd Ed. §13774, C. L. 1897 (10718).

11. §3 of Act 179 of 1891, C. L. 1915 (14798), How. 2nd Ed. §13768, C. L. 1897 (10712). Where the defendant offers to subrogate the claimant to the rights of an alleged contract purchaser from defendants, the offer must be acted upon and accepted in order to confer upon claimant the rights involved. Fuller v. Detroit Loan & Building Ass'n, 119 Mich. 71 (74), 77 N. W. 642.

12. §16 of Act 179 of 1891, C. L. 1915 (14811), How. 2nd Ed. §13781, C. L. 1897 (10725).

CHAPTER XII.

PROCEEDINGS TO ENFORCE LIENS.*

§ 85. Time Within Which Proceedings to Enforce to Be Instituted, Perfected or Extended to Add New Parties.
86. Nature of Proceedings and Requirements of Bill, in General.
87. Prerequisites to Filing of Bill, in General.
88. Prerequisites to Filing Bill to Enforce, by Contractor.
89. Parties to Proceedings to Enforce.
90. Practice in Proceedings to Enforce, in General.
91. Practice in Proceedings to Enforce (Cont'd) Amendments.
92. Practice in Proceedings to Enforce (Cont'd) Evidence.
93. Defenses in Suits to Enforce Liens.
94. Appeals.

§ 85. Time Within Which Proceedings to Enforce to Be Instituted, Perfected or Extended to Add New Parties.

The proceedings for enforcement are statutory.[1] The several liens provided for by statute continue for one year after the claim, statement or account is filed in the office of the register of deeds, and no longer unless proceedings are begun to enforce the same.[2] The action is in rem and must be in the jurisdiction of the location of the property,

*In general as to the subjects comprehended in Chapter XII, see Title "Mechanics' Liens," 34 Cent. Dig. §§427-654, and 13 Dec. Dig. §§245-310.

1. §10 of Act 179 of 1891 as amended by Act 394 of 1913, C. L. 1915 (14805), How. 2nd Ed. §13775, C. L. 1897 (§10719), and subsequent sections of act. Relative to proceedings to enforce, in general, see: Jones on Liens, 3rd Ed. §§1553-1617; Rockel on Mechanics' Liens, §§196-302; Boisot on Mechanics' Liens, §§507-604, 605-704; Phillips on Mechanics' Liens, 3rd Ed. §§305, 336, 684-792; Overton on Liens, §§571-573; Wilkinson on Mechanics' Liens, pp. 70-81; 27 Cyc. 317 et seq.

2. §9 of Act 179 of 1891, as amended by Act 199 of 1893, and Act 143 of 1897, C. L. 1915 (14804), How. 2nd Ed. §13774, C. L. 1897 (10718); 27 Cyc. 218-220, 335-344. As to limitations upon enforcement of me-

and where the claim of lien is filed.[3] The suit is to be regarded as instituted when the bill is filed,[4] and the time is computed from the date of filing the claim of lien with the register of deeds to the date of filing the bill to foreclose or cross bill.[5] The lien terminates at the expiration of the statutory period, notwithstanding a bill was previously filed where it was fatally defective and prematurely filed in that the contractor did not, before filing, serve the owner with the requisite sworn statement required in section 4 of the lien law,[6] though after the expiration of the year, where the original bill was filed in time, an answer in the nature of a cross bill may be amended to properly restate the facts constituting the cause of action set forth in the original answer though probably not to state a new and distinct cause of action;[7] and although the year for bringing suit has expired, amendments have been permitted, to add new proper parties,[8] and even after hearing, amendments have been permitted to add new parties[9] as well as to add a verification to the bill, where the opposite party had appeared generally and demurred.[10] Where a proper or necessary party defendant is added by amendment, only the newly added de-

chanics' liens, see: Boisot on Mechanics' Liens, §§13-14, 720-731; Phillips on Mechanics' Liens, 3rd Ed. §§266-271, 322-336; Houck Law of Liens, §§180-187; Overton on Liens, §576.

3. 27 Cyc. 318-320, 323; Prather Engineering Co. v. Detroit, Flint & Saginaw Ry., 152 Mich. 582 (585), 116 N. W. 376; Comstock v. McElroy, 52 Mich. 324, 17 N. W. 931.

4. Sheridan v. Cameron, 65 Mich. 680 (682), 32 N. W. 894; Casserly v. Wayne Circuit Judge, 124 Mich. 157 (161), 82 N. W. 841.

5. Hannah & Lay Co. v. Mosser, 105 Mich. 18 (27), 62 N. W. 1120.

6. Dittmer v. Bath, 117 Mich. 571, 76 N. W. 89.

7. Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141, 71 N. W. 466.

8. A receiver of the owner was held proper to be added. Prather Engineering Co. v. Detroit etc., Railway, 152 Mich. 582 (585), 116 N. W. 376. A contractor was permitted to be added against objection of other parties: Casserly v. Wayne Circuit Judge, 124 Mich. 157 (161), 82 N. W. 841.

9. Principal contractor added on rehearing after appeal to Supreme Court. Godfrey Lumber Co. v. Kline, 167 Mich. 629 (630), 133 N. W. 528; 160 Mich. 565 (568), 125 N. W. 682.

10. Daschke v. Schellenberg, 125 Mich. 216, 84 N. W. 67; Prather Engineering Co. v. Detroit etc., Railway, 152 Mich. 582 (585), 116 N. W. 376.

fendant can successfully raise the objection that he was not made a party within the year.[11]

§ 86. Nature of Proceedings and Requirements of Bill, in General.

Proceedings to enforce such lien are required to be by bill in chancery, under oath, and notice of *lis pendens* filed for record in the office of register of deeds, has the effect to continue such lien pending the proceedings.[12]

The bill should set up every substantial requisite and every fact essential to jurisdiction including the allegation that defendant was either owner, part owner or lessee of the land upon which the lien is sought to be enforced, or set out his other interest, therein or connection therewith.[13] A bill not containing proper averments in this respect is unless cured by amendment fatally defective.

11. Casserly v. Wayne Circuit Judge, 124 Mich. 157 (161), 82 N. W. 841.

12. §10 of Act 179 of 1891, as amended by Act 394 of 1913, C. L. 1915 (14805); How. 2nd Ed. §13775, C. L. 1897 (10719) The lis pendens is purposed to bind subsequent interests, serves the same purpose as under the general chancery practice, and hardly seems necessary as against the original parties. Sheridan v. Cameron, 65 Mich. 682, 32 N. W. 894; Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141 (146), 71 N. W. 466. Lis pendens is probably not essential upon the filing of cross bill where one was filed upon original bill. Hall Lumber Co. v. Gustin, 54 Mich. 624 (633-634), 20 N. W. 616. Relative to pleadings in proceedings to enforce, see: Jones on Liens, 3rd Ed. §§1587-1605; Rockel on Mechanics' Liens, §§215, 235-255; Boisot on Mechanics' Liens, §§534-577, 702-704; Phillips on Mechanics' Liens, 3rd Ed. §§402-432; Kneeland on Mechanics' Liens, 2nd Ed. §§197-214. As to lis pendens and its effect. Phillips on Mechanics' Liens, 3rd Ed. §§269-270; 27 Cyc. 387-388.

13. Clark v. Raymond, 27 Mich. 456 (460-461), where it was held that the failure of the bill to state that the defendant was the owner was not cured by his admission of ownership in the answer, particularly where he denied having contracted with reference to that particular land. Knapp Electrical Works v. Mecosta Electric Co., 110 Mich. 547, 68 N. W. 245; Willard v. Magoon, 30 Mich. 273; Wagar v. Briscoe, 38 Mich. 587. Prayer for process is now omitted. See Circuit Court Rule 24. In an earlier case the omission of prayer for process was held not fatal where the parties were otherwise sufficiently identified. Sheridan v. Cameron, 65 Mich. 680 (682), 32 N. W. 466. For forms of bills by the various parties, see Forms No. 18 to 22 inclusive, in Appendix.

The bill need not negative exceptions to the liability of the owner contained in the statute following the provisions declaring the lien;[14] to state generally the interests of other lien holders, or incumbrancers in the property, is sufficient; a bill to foreclose a lien, joining as a defendant the receiver of the debtor's estate must aver leave of court to sue the receiver. Where the bill states that notice of the claim of lien was properly given to the owner, it is not essential that the bill also aver demand for payment of the claim before the bill was filed.[15] A bill will not lie to enforce a lien where the contract for a building provided that the work should be done to the satisfaction of the owner and not be paid for until satisfactory, where it appears that the owner's claim that the work was not completed to his satisfaction is not captious and has substantial basis,[16] nor for extras furnished until after allowed in arbitration or by agreement, where the contract provided that until the value of extras has been fixed by arbitration or agreement, the same shall not be due.[17] The bill should show that the defendant had some interest in the land at the time the materials were furnished; it is not sufficient to show defendant's ownership at the time the bill was filed, only.[18] Formerly the circuit courts in chancery had no jurisdiction of bills to enforce mechanics liens for amounts of less than one hundred dollars;[19] this limitation has, however, been removed by statute and a bill to enforce a lien for less than that amount will not be objectionable if otherwise proper.[20] Where the

14. Smalley v. Ashland Brown-Stone Co., 114 Mich. 105 (108-109), 72 N. W. 29.

15. Steel Brick Siding Co. v. Muskegon Machine & Foundry Co., 98 Mich. 616 (619), 57 N. W. 817.

16. Boots v. Steinberg, 100 Mich. 134 (139), 58 N. W. 657.

17. The extras claimed cannot be called due, for they were to be submitted to arbitration, and no step has been taken to that end. The parties have seen fit to make their contract, and it is not for us to make one for them. They have provided their own forum to determine the value of extras, and it is not for us to deprive either of the right to such forum. Boots v. Steinberg, 100 Mich. 135 (139), 58 N. W. 657.

18. Willard v. Magoon, 30 Mich. 273.

19. Dewey v. Duyer, 39 Mich. 509.

20. Act 129 of 1881; C. L. 1915

bill made the wife the sole defendant in a case where the claim of lien was served upon her and the land belonged to her, but the building was erected under a contract with and of, the husband, the wife's land was held not to be subject to lien.[21]

All bills, whether original, intervening or crossbills, are required to be on oath and, when sworn to, are evidence of the matters therein charged unless denied by answer under oath.[22]

Amendments may be made to any bill or cross-bill at any time before final order, and if it appears that any party has had insufficient notice of such proceedings, such further notice shall be given as the court shall think just.[23]

§ 87. Prerequisites to Filing of Bill, in General.

Under the statute[24] the written statement or claim of lien of the party furnishing the labor or material, whether he be original contractor, subcontractor, laborer or materialman, must be duly made, verified and filed in the proper register of deeds' office; proper service of a copy thereof must, except where the claimant deals directly with the owner, be made on the owner, part owner or lessee, either in person, or on his agent in charge of the premises in case he cannot be found, within the county, or by posting on the premises, in case neither owner nor agent in charge can be found, according to the particular circumstances, and proof of such service must be made by affidavit and filed in such register's office. These requirements are, for the most part, mandatory, and should be complied with "before any

(12301), How. 2nd Ed. §11952, C. L. 1897 (435).

21. Hall v. Erkfitz, 125 Mich. 332, 84 N. W. 310.

22. §10 of Act 179 of 1891 as amended by Act 394 of 1913, C. L. 1915 (14805), How. 2nd Ed. §13775, C. L. 1897 (10719).

23. §10 of Act 179 of 1891 as amended by Act 394 of 1913, C. L. 1915 (14805), How. 2nd Ed. §13775, C. L. 1897 (10719); 27 Cyc. 344, (398-401). In case a petition to file a supplemental bill is preferred, see Form No. 36 in Appendix.

24. §§5 and 6 of Act 179 of 1891 as amended by Act 199 of

subsequent proceedings shall be taken for the enforcement of such lien."[25]

§ 88. Prerequisites to Filing Bill to Enforce, by Contractor.

The furnishing of the statement required to be given by the contractor to the owner giving the names and number of subcontractors, materialmen and laborers, and the amount due to each under section 4 of the mechanics lien law, is an essential prerequisite to the filing of a bill by such contractor to foreclose a lien, and a bill filed by a contractor before such statement is given is ordinarily prematurely filed and the defect is fatal.[26] The question of compliance

1893, C. L. 1915 (14800)-(14801) How. 2nd Ed. §§13770-13771, C. L. 1897 (10714)-(10715).

25. §6 of Act 179 of 1891 as amended by Act 199 of 1893, C. L. 1915 (14801), How. 2nd Ed. §13771, C. L. 1897 (10715). But filing proof of service with the register of deeds before commencing proceedings has been held directory only. Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141 (148), 71 N. W. 466.

26. See §39, paragraph (d); Wildey v. Gillett, 171 Mich. 153, 136 N. W. 1116; Sterner v. Haas, 108 Mich. 488, 66 N. W. 348; Wiltsie v. Harvey, 114 Mich. 131, 72 N. W. 134; Barnard v. McLeod, 114 Mich. 73, 72 N. W. 24; Adams v. Central City Granite etc. Co., 154 Mich. 448 (458), 117 N. W. 432; Dittmer v. Bath, 117 Mich. 571, 76 N. W. 89. The furnishing of the sworn statement to the owner as a prerequisite to suit is not required of manufacturers selling materials made in their own shops, as they are not contractors but materialmen. Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111, 82 N. W. 801. The requirement of sworn statement is not dispensed with by the fact that 60 days from full completion of the work have expired when bill is filed. Martin v. Warren, 109 Mich. 584, 67 N. W. 897. Nor because all material and labor have been paid for and such statement has never been requested by owner. Sterner v. Haas, 108 Mich. 488, 66 N. W. 348. Nor because the owner and the contractor are the only parties interested. Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111, 82 N. W. 801. Failure to serve the sworn statement was held not fatal to the maintenance of an action in assumpsit, where it appeared that the objection was not raised on trial in Justice Court, that the statement was never demanded, and that all bills had been paid (Bollin v. Hooper, 127 Mich. 287, 86 N. W. 795); nor where the time to obtain liens has long since passed, and it appears that no subcontractors, laborers or materialmen are in position to assert liens or subject the owner to litigation. Walker v. Syms, 118 Mich. 183, 76 N. W. 320; Morton v. Eaton, 141 Mich.

with section 4 by the contractor may be raised by an adverse lienor,[27] or by any other person whose interests are affected, and the owner may not by waiver give the contractor's lien a validity which it would not otherwise have, prejudicial to the interest of other lienors, claimants or incumbrancers.[28]

§ 89. Parties to Proceedings to Enforce.

In proceedings to foreclose liens[29] the plaintiff is required to make other lienors and all persons having rights in the property affected or to be affected by liens filed in the office of the register of deeds, and those having filed notice of intention to claim a lien, parties to the action.[30] In cases to enforce liens instituted by subcontractors, the contractor is a material and necessary party defendant in the bill, and

444 (449). Where the contractor filed bill to foreclose lien without giving the owner the sworn statement required by section 4, the proceeding was premature and the lien terminated at expiration of the statutory period. Dittmer v. Bath, 117 Mich. 571, 76 N. W. 89. See generally as to the prerequisites to filing bill, 27 Cyc. 323-5.

27. Wiltsie v. Harvey, 114 Mich. 131, 72 N. W. 134.

28. See §74; Adams v. Central City Granite etc., Co., 154 Mich. 448 (458), 117 N. W. 932.

29. Parties to proceedings to foreclose liens; in general, see: Jones on Liens, 3rd Ed. §§1567-1586; Rockel on Mechanics' Liens, §§216-231; Boisot on Mechanics' Liens, §§522-533; Phillips on Mechanics' Liens, 3rd Ed. §392. 27 Cyc. 327-329, 344-361.

30. §10 of Act 179 of 1891 as amended by Act 394 of 1913, C. L. 1915 (14805), How. 2nd Ed. §13775, C. L. 1897 (10719). The receiver of the contractee is a necessary party to bill filed by a contractor to foreclose a mechanics' lien, and unless the bill makes a case against him, it must fail as to the other defendants. Burk v. Muskegon Machine & Foundry Co., 98 Mich. 614, 57 N. W. 804; Steel Brick Siding Co. v. Muskegon Machine & Foundry Co., 98 Mich. 616, 57 N. W. 817. The objection that proper parties are not joined may be made by answer or demurrer or at the hearing. Godfrey Lumber Co. v. Kline, 160 Mich. 565 (568), 125 N. W. 682; Prather Engineering Co. v. Detroit etc Railway, 152 Mich. 582 (585), 116 N. W. 376. Formerly, objection that a receiver was made a party without proper leave of court could be taken by demurrer. Prather Engineering Co. v. Detroit etc., Railway, 152 Mich. 582 (585), 116 N. W. 376; Burk v. Muskegon Machine & Foundry Co., 98 Mich. 614, 57 N. W. 817; Steel Brick Siding Co. v. Muskegon Machine & Foundry Co., 98 Mich. 616, 57 N. W. 817. Amendments have been permitted to add new parties though year for bringing suit has expired. Prather Engineering Co. v. De-

failure to include him is a ground for reversal on appeal.[31] All persons holding like liens or having filed notice of intention to claim a lien, or other persons having rights in the property, may make themselves parties on motion to the court, and notice to complainant, and may file their intervening or cross-bills or answers claiming the benefit of cross-bills and notices of *lis pendens* therein.[32] Parties entitled to liens under this act whose claims are not due and payable, may give notice of their intention to claim liens, and may become parties to any suit to enforce a lien, or institute such suit or proceedings themselves, and their claims are to be allowed subject to a reduction of interest, if such claims are not due at the time of the rendition of decree, but no process can issue or proceedings be had to enforce a decree for such claims until the same mature.[33] Whenever the principal contractor or any subcontractor has given to the owner, or to any other person or persons having rights in the property subject to lien any bond or surety or guaranty of any kind to protect such owner or other person or persons having rights in said property against the lien provided for by law, then the plaintiff or the owner or other person or persons having rights in said property, may make the surety or sureties in such bond or guaranty, parties to

troit etc., Railway, 152 Mich. 582 (585), 116 N. W. 376; Casserly v. Wayne Circuit Judge, 124 Mich. 157 (161), 82 N. W. 841. And after hearing. Godfrey Lumber Co. v. Kline, 160 Mich. 565 (568), 125 N. W. 682.

31. Leave has been given by the Supreme Court to add the contractor as a party upon rehearing. Godfrey Lumber Co. v. Kline, 160 Mich. 565 (567), 125 N. W. 682; Kerns v. Flynn, 51 Mich. 573, 17 N. W. 62; Prather Engineering Co. v. Detroit etc. Railway, 152 Mich. 582 (585), 116 N. W. 376.

32. §10 of Act 179 of 1891, as amended by Act 394 of 1913, C. L. 1915 (14805), How. 2nd Ed. §13775, C. L. 1897 (10719); 27 Cyc. 360-361. A petition by an intervening partnership under section 10 [C. L. 1915 (14805)] is not fatally defective because describing the intervenors in the partnership name instead of their individual names; as this may be cured by amendment. Kleinert v. Knoop, 147 Mich. 387 (389), 110 N. W. 941. See Forms No. 24 and 32 to 35 inclusive in appendix.

33. §26 of Act 179 of 1891; C. L. 1915 (14821), How. 2nd Ed. §13791, C. L. 1897 (10735). See Form No. 23 in appendix.

the action to enforce lien by original bill or by cross bills or answers claiming the benefit of a cross bill, and the court shall thereupon settle and determine the rights and liabilities of all the parties in the matter, and make such decree as may be required to determine and enforce the rights and liabilities of the various parties including such surety or sureties.[34]

§ 90. Practice in Proceedings to Enforce, in General.

The practice in all suits brought to enforce liens under the provisions of this act is the same as in ordinary chancery cases, and the court has the same power and jurisdiction over the subject-matter and parties to the suit as in other chancery cases except as by statute otherwise expressly provided.[35] When any defendant resides out of the state, or is absent from the state or concealed therein, or cannot be found by reason of continued absence from his place of residence, the plaintiff may cause notice to be given by pub-

34. §10 of Act 179 of 1891, as amended by Act 394 of 1913, C. L. 1915 (14805), How. 2nd Ed. §13775, C. L. 1897 (10719). In proceedings under the Mechanics' Lien Law all rights of the parties can and should be adjusted in one proceeding under the statute, and the owner, made a defendant to the original bill or brought in by cross bill, who in a cross bill prays relief against the surety on an indemnity bond, is entitled to have his equities adjusted in the decree by requiring the payment of damages for such liens or claims as may have been filed against the property contrary to the provisions of the bond and to recover in addition, damages for such loss or injury as resulted because of the principal's failure to complete the building pursuant to the contract. C. H. Little Co. v. L. P. Hazen Co., 185 Mich. 316 (325-9), 152 N. W. 95; Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 23 D. L. N. 73 (78), 157 N. W. 96. See Forms No. 28, 29 and 30 in appendix.

35. §27 of Act 179 of 1891 as amended by Act 143 of 1897, C. L. 1915 (14822), How. 2nd Ed. §13792, C. L. 1897 (10736). This procedure is in general now fixed by the Judicature Act, being Act 314 of the Public Acts of 1915, C. L. 1915 (12229), et seq.; Steel Brick Siding Co. v. Muskegon Machine & Foundry Co., 98 Mich. 616 (620), 57 N. W. 817. See Hagar v. Schliess, 183 Mich. 610, 149 N. W. 1058; Vaughan v. Wayne Circuit Judge, 153 Mich. 478 (480), 116 N. W. 1080; as to pleadings in general, see: 27 Cyc. 367-407; 12 Encyc. of Forms No. 13642 to No. 13819. It has been held the duty of the Supreme Court to answer a claim of error though answer is not suggested by counsel. Greilick Co. v. Rogers, 144 Mich. 313 (315), 107 N. W. 885.

lication in like manner and upon the same conditions as in ordinary suits in chancery.[36] Under the present practice demurrers, pleas in abatement and pleas to the jurisdiction, are abolished and all questions heretofore raised by plea or demurrer are hereafter required to be raised by motion to dismiss or in the answer or in a notice attached to the plea, and where raised by answer or notice the questions may, upon four days notice by either party, be brought up for determination in advance of the trial upon the merits.[37] Under the previous practice: a bill filed to enforce a mechanic's lien which was not sworn to, was demurrable;[38] where the bill did not implead the necessary parties the objection thereto for that defect was permitted to be taken by answer, demurrer, plea or at the hearing;[39] where the several defendants joined in a general demurrer only such grounds of demurrer were open to consideration as were available to all those joining;[40] and on the hearing of a general demurrer oral objections, co-extensive with the demurrer filed, might be raised.[41] In practice the statutory provisions applicable up to the time of the attaching of the lien, and the proceedings to acquire lien will be strictly construed and at least a substantial compliance with the provisions of the statute will be required; after the lien has attached however, the statutory provisions pertaining to the

36. §28 of Act 179 of 1891, C. L. 1915 (14823), How. 2nd Ed. §13793, C. L. 1897 (10737). The procedure for bringing in and adjudicating the rights of absent defendants is fixed in the Judicature Act, Act 314 of 1915, Chapter XIII, §§46-49; Cummings & Beecher, §§572-575; C. L. 1915 (12449)-(12452). The procedure regarding unknown defendants is fixed by the Judicature Act, Act 314 of 1915, Chap. XII, §§20-27; Cummings & Beecher, §§494-501, C. L. 1915 (12371)-(12378).

37. Act 314 (Judicature Act) of 1915, Chapter XIV, §4; Cummings & Beecher, §579; C. L. 1915 (12456). For examples of issues that may now be raised by motion, see Form No. 25 in appendix.

38. Daschke v. Schellenberg, 125 Mich. 216, 84 N. W. 67.

39. Prather Engineering Co. v. Detroit etc., Railway, 152 Mich. 582 (585), 116 N. W. 376; Godfrey Lumber Co. v. Kline, 160 Mich. 565, 125 N. W. 682.

40. Burk v. Muskegon Machine & Foundry Co., 98 Mich. 614, 57 N. W. 804.

41. Burk v. Muskegon Machine & Foundry Co., 98 Mich. 614 (616), 57 N. W. 804.

enforcement of liens and the proceedings therefor will be given a liberal construction to secure the beneficial results, intents, purposes and remedial character of the statute, and substantial compliance will be held sufficient.[42] As the statute permits or requires the rights and liabilities of all parties interested in the property or controversy to be determined in a single proceeding, a bill making the surety on an indemnity bond a party is not open to objection because of the existence of an adequate remedy at law.[43] The statute contemplates that all parties in interest shall have their respective rights adjudicated in one proceeding and affirmative relief may be obtained by a defendant against a co-defendant by an answer in the nature of a crossbill;[44] and in a suit to foreclose a lien the defendant owner may maintain a cross bill to recover damages sustained by claimant's failure to perform his contract[45] but he cannot recoup his damages without praying for affirmative relief.[46] But after acceptance of the building by the owner as complying with the contract, he cannot recoup against a materialman for defects in construction,[47] and the owner may offset

42. §27 of Act 179 of 1891 as amended by Act 143 of 1897, C. L. 1915 (14822), How. 2nd Ed. §13792, C. L. 1897 (10736). See §4 herein for a full discussion upon the character and rules of construction to be applied to the statute and the proceedings thereunder.

43. §10 of Act 179 of 1891 as amended by Act 394 of 1913, C. L. 1915 (14805), How. 2nd Ed. §13775, C. L. 1897 (10719); C. H. Little Co. v. L. P. Hazen Co., 185 Mich. 316 (325), 152 N. W. 95; see: Koch v. Sumner, 145 Mich. 358 (364-5), 108 N. W. 725; Webster & Co. v. Hotel Co., 151 Wis. 1, 138 N. W. 102; Yawkey-Crowley Lumber Co. v. DeLonge, 157 Wis. 390, 147 N. W. 334. For an example of such a bill, see Form No. 28 in appendix.

44. Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141 (150), 71 N. W. 466; Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 23 D. L. N. 73 (74), 157 N. W. 96; C. H. Little Co. v. L. P. Hazen Co., 185 Mich. 316 (317), 152 N. W. 95; Smalley v. Ashland Brown-Stone Co., 114 Mich. 104 (105-6), 72 N. W. 29. See Form No. 31 in appendix.

45. Wildey v. Gillette, 171 Mich. 153 (155), 136 N. W. 1116; Koch v. Sumner, 145 Mich. 358 (364-5), 108 N. W. 285.

46. J. W. Reedy Elevator Mfg. Co. v. Peck, 149 Mich. 657 (667), 113 N. W. 300.

47. Hannah & Lay Co. v. Hartzell, 125 Mich. 177 (181), 84 N. W. 52.

Where owner waived right to completion and made payment to

against the contract price his claim for damages for delay in construction.[48] Defendant's answer setting up that the bill does not show performance of all conditions prerequisite to enforcement of the lien sufficiently raises the question of the failure of the contractor to furnish the owner a statement under oath of the amounts due to subcontractors, laborers and materialmen.[49] In a chancery suit to determine the rights of lienors where all the parties are in court, the liability of the sureties will be determined in the same proceeding.[50] Under chancery rule 10 d (now Circuit Court Rule No. 25) the failure of the defendant owner, in a suit to enforce a lien, to answer a material allegation of the bill, admits the truth of such allegation and obviates the necessity of proving it.[51] If any lien claimant shall die before the commencement of a suit thereon, or the taking of proceedings to enforce the same, the suit or proceeding may be commenced and prosecuted by his executors or administrators, or if commenced in his lifetime, may be prosecuted by them, as it might have been by the deceased himself if living.[52]

In an instance when claimant filed two statements of lien for the same debt, the second being to supply supposed deficiencies in the first, it does not make an election between the statements necessary.[52a]

§ 91. Practice in Proceedings to Enforce (Cont'd) Amendments.

Amendments to any process, pleadings or proceedings in such actions to enforce liens, either in form or in substance,

contractor, he could not in a proceeding by materialmen to perfect liens offset against them losses of rent or recoup damages. Stevens v. Garland,—— Mich.——, 164. N. W. 516.

48. Smalley v. Gearing, 121 Mich. 190 (202), 79 N. W. 1114, 80 N. W. 797; Wells v. Board of Education, 78 Mich. 260, 44 N. W. 267.

49. Wildey v. Gillett, 171 Mich. 153, 136 N. W. 1116.

50. Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 23 D. L. N. 73 (78), 157 N. W. 96; C. H. Little Co. v. L. P. Hazen Co., 185 Mich. 316, 152 N. W. 95. See Forms No. 29 and 30 in appendix.

51. Greilick Co. v. Rogers, 144 Mich. 313 (315-6), 107 N. W. 885.

52. §24 of Act 179 of 1891, C. L. 1915 (14819), How. 2nd Ed. §13789, C. L. 1897 (10733). See Forms No. 37 and 38 in appendix.

52a. Fox v. Benham Mfg. Co., —— Mich., —— 164 N. W. 385.

shall be allowed at any time before final decree, on application of either party upon such terms and conditions as justice may require, and security for costs may be required as in other chancery cases.[53] Amendments may be made to any bill or cross-bill at any time before final order, and if it shall appear that any party has had insufficient notice of any such proceeding, such further notice shall be given as the court shall think just.[54] The plaintiff, at any time before or after the hearing on questions now raised by motion but formerly raised by plea or demurrer, is entitled to amend his pleadings, so as to meet the objections raised thereto, upon such terms as the court may deem proper.[55] Amendments have been permitted to add new parties though the year for bringing suit has expired, and upon or after hearing;[56] also to properly restate the facts set forth in the original answer, though the statute would bar a new bill.[57] Where the defendant appeared generally and demurred, it was held that the bill might be amended by adding a verification after the statutory period for filing the bill had expired,[58] and that an intervening petition might be amended to state the names of the individual members of the partnership appearing as petitioner.[59] The statutory provisions regarding amendments relate to the proceedings in an action

53. §27 of Act 179 of 1891 as amended by Act 143 of 1897, C. L. 1915 (14822), How. 2nd Ed. §13792, C. L. 1897 (10736); 27 Cyc. 344, 398-401; Rugg v. Bassett, 101 Mich. 441, 59 N. W. 645.

54. §10 of Act 179 of 1891 as amended by Act 394 of 1913, C. L. 1915 (14805), How. 2nd Ed. §13775, C. L. 1897 (10719); Hannah & Lay Co. v. Mosser, 105 Mich. 18, (29), 62 N. W. 1120.

55. Act 314 (Judicature Act) of 1915, Chapter XIV, §4; Cummings & Beecher, §579; C. L. 1915 (12456).

56. Prather Engineering Co. v. Detroit etc., Railway, 152 Mich. 582 (585), 116 N. W. 376; Casserly v. Wayne Circuit Judge, 124 Mich. 157 (161), 82 N. W. 841. For a case where the contractor was not made a party and an amendment was permitted after the lapse of the year to join him, see Godfrey Lumber Co. v. Kline, 160 Mich. 565 (568), 125 N. W. 682.

57. Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141 (149), 71 N. W. 466.

58. Daschke v. Schellenberg, 125 Mich. 216, 84 N. W. 67; Prather Engineering Co. v. Detroit, Flint & Saginaw Railway, 152 Mich. 582 (585), 116 N. W. 376.

59. Kleinert v. Knoop, 147 Mich. 387 (389), 110 N. W. 941.

to enforce, and amendments to supply jurisdictional defects in the claim of lien cannot be made after the statutory period for perfecting lien has expired.[60] A formal amendment to a bill merely adding a new party defendant and not affecting the rights of a defendant who has answered, covering the particular defenses to the original bill, does not authorize him to file an answer setting up new matter to the amended bill.[61]

§ 92. Practice in Proceedings to Enforce (Cont'd) Evidence.

In general the usual rules of evidence will apply in proceedings to enforce liens[62] and the burden of proof is upon the complainant to establish compliance with the statutory requirements essential to his lien[63] and the value of the labor and materials furnished.[64] The statute however, expressly provides that all bills of complaint sworn to shall be evidence of the matters therein charged unless denied by answer under oath,[65] and it has been held under this statute that notwithstanding the general rule applicable in chancery cases, a bill to foreclose a mechanics' lien which is duly sworn to, is evidence of the matters therein charged unless the answer denies them under oath.[66] The bill therefore, if it contains all of the facts necessary to entitle the plaintiff to relief and is duly sworn to and not denied by an-

60. Substitution of the correct name of the contractor when another's name had been mistakenly entered in the claim of lien is not allowed after the statutory period for perfecting lien has expired. Lacy v. Piatt Power & Heat Co., 157 Mich. 544, 122 N. W. 112; Maderia Flume Co. v. Kendall, 120 Cal. 182, 52 Pac. 304.

61. Casserly v. Wayne Circuit Judge, 124 Mich. 157 (162-163), 82 N. W. 841.

62. 27 Cyc. 407-419. The Judicature Act, Act 314 of 1915, Chap. XVII, C. L. 1915 (12489)-(12572), prescribes the method of taking evidence in chancery proceedings.

63. Roberts v. Miller, 32 Mich. 289; 27 Cyc. 402-404 (407).

64. Doetsch v. Wetlaufer, 157 Mich. 202, 121 N. W. 746.

65. §10 of Act 179 of 1891, amended by Act 394 of 1913, C. L. 1915 (14805), How. 2nd Ed. §13775, C. L. 1897 (16719). This evidentiary character would probably also apply to intervening and cross bills.

66. Green Bay Cut Stone Co. v. Fabry, 169 Mich. 544 (548), 135 N. W. 312.

swer under oath, makes a *prima facie* case and shifts the burden of proof to the defendant.[67] As a general rule the lien attaches to the extent of the statutory limit and where a claimant seeks an enlargement of the statutory quantity of land he should claim, aver and prove his demand.[68] General testimony by a plaintiff tending to establish a lien, together with admissions by the defendant in his answer and letters to the plaintiff acknowledging the debt but postponing payment thereof, were held sufficient to make out a case.[69] Where extra work and materials were furnished and under the contract the price might be increased or diminished by changes, and there was no evidence to show the contract price as finally adjusted or whether the alterations or extras were large, it was held that in the absence of evidence to establish it, it could not be presumed that the amount paid by the owner was in full or in excess of the contract price as finally agreed upon.[70] Where the written contract for the construction of a building was in evidence, it was held not erroneous to exclude evidence of a parol contract not claimed to be subsequent to the written contract relative to the furnishing of heat during erection, that subject not being mentioned in the written contract.[71] Where the plans were changed and alterations made, evidence of what the building would cost according to the original plans was held properly excluded.[72] Upon an appeal in a lien proceeding,

67. Hannah & Lay Co. v. Mosser, 105 Mich. 18 (29), 62 N. W. 1120. The right to rely on the verified bill as making a prima facie case is not lost by including in the bill a clause waiving a sworn answer. Green Bay Cut Stone Co. v. Fabry, 169 Mich. 544 (547-8), 135 N. W. 312: Greilick Co. v. Rogers, 144 Mich. 313 (315-6), 107 N. W. 885; see Roberts v. Miller, 32 Mich. 289, wherein it was held that the bill of complaint, duly sworn to and not denied by the defendant, no answer being put in, was not prima facie evidence on the trial in support of the complainant's claim.

68. Adams v. Central City Granite, etc. Co., 154 Mich. 448 (454-57), 117 N. W. 932.

69. Albert Gall Co. v. Dowagiac Gas Co., 160 Mich. 255, 125 N. W. 283.

70. Hannah & Lay Co. v. Hartzell, 125 Mich. 177, (180), 84 N. W. 52.

71. Johnson v. O'Neill, 181 Mich. 326 (329), 148 N. W. 364, 150 N. W. 835.

72. Johnson v. O'Neill, 181 Mich. 326 (329-30), 148 N. W. 364, 150 N. W. 835.

where the circuit judge, having had the advantage of seeing the witnesses and hearing their testimony, has found the facts and there is testimony to support his findings, in reviewing the evidence much weight will be attached to his opinion.[73] A variance between the pleadings and proofs where the defendant was not misled by the erroneous allegations is not fatal,[74] and a small variance between the amount actually due a lienor and that claimed by him, will not, in the absence of bad faith, defeat his lien.[75] That a statement or claim of lien set up that the material was furnished under one contract, while the bill and proofs mentioned two contracts, was not considered a material variance.[76] The lien claimant should furnish evidence of the compliance with the statutory prerequisities[77] and, if he is

73. Malcomson-Houghten Co. v. Gregorian Building Co., 191 Mich. 678 23 D. L. N. 405, 158 N. W. 126; Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 23 D. L. N. 73 (76), 157 N. W. 96; Chadderdon v. Maxwell, 175 Mich. 709, 141 N. W. 596; Fredrick v. Willis, 176 Mich. 106, 142 N. W. 342. Testimony examined and held insufficient to establish a contract between the owner of real property and contractor in regard to improvements bargained for by his tenants. Merrill v. Brant, 175 Mich. 182 (185), 141 N. W. 550. Evidence and stipulations held insufficient to establish a claim that the original verbal contract for construction provided that the cost of the structure should be offset against an indebtedness outstanding between the contractor and the defendant. Pittsburgh Plate Glass Co., v. Charles Klein Co., 177 Mich. 399, 140 N. W. 484.

Evidence to effect that materialman verbally consented to payments to contractor direct, examined and held sufficient to support trial court's conclusion that plaintiff did not waive lien. Marquette Lumber Co. v. Albee, —— Mich. ——, 162 N. W. 1005.

74. Zilz v. Wilcox, 190 Mich. 486, 23 D. L. N. 24·(26), 157 N. W. 77

75. Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 23 D. L. N. 73 (77-8), 157 N. W. 96.

76. Lamont v. LeFevre, 96 Mich. 175 (176-177), 55 N. W. 687.

77. Roberts v. Miller, 32 Mich. 289; Clark v. Raymond, 27 Mich. 456. The statute (Montana) was designed to give security to those who, by their labor, skill and materials, add value to property, by a pledge of the interest of their employer for their payment; and for that purpose it subordinates all other interests acquired subsequent to the commencement of their work, although no notice that a lien may even be claimed is required, except within sixty days after the work is completed. Mortgagees and others acquiring interests in property against which such a lien is sought to be enforced have a right, therefore, to call for strict proof of all that is essential to the creation of the lien; and that includes proof of the commencement of the work, of its character, and of its completion. The

the original contractor, evidence of having given a sworn statement of the names and amounts due subcontractors, laborers and materialmen; of the filing and perfection of the lien by service and proof of service;[78] that no proceeding at law is pending to collect the debt; of the truth of the several matters required to be set forth in the claim, statement or account of lien; of the contract between the principal contractor and the owner[79] and the price as fixed therein or as augmented by alterations and extras; in case the lien is claimed against an estate by the entirety or a homestead, that the contract was in writing and signed by both the husband and wife; in case the contract was with the owner of less than the full title, the character of the interest of the person with whom the contract was made;[80] in case there are other liens or claims which may have priority, it would be well to indicate the nature and character of such prior claims; a subcontractor claiming a lien should show the amounts due, laborers and materialmen to be paid in preference to his claim, and a contractor as lien claimant should show the amounts due subcontractors, laborers and ma-

commencement of the work must be shown, for from that date the lien attaches, if at all. The character of the work must be shown, for it is not for all kinds of work that a lien is allowed. The completion of the work must be shown, for notice of claiming a lien must be filed in the recorder's office within sixty days from that time. This proof must be furnished by the party who asserts the existence of the lien. Davis v. Alvord, 94 U. S. 547. When a party attempts to enforce a lien under this law, he should be held to make clear and satisfactory proof of the agreement upon which he bases his lien, and if the agreement is verbal, and the parties are wholly at variance in their evidence as to its substantial terms, as in this instance, the evidence of the petitioners ought to be so preponderant as to satisfy all reasonable and just minds without much hesitation of the correctness of their allegations. Clark v. Raymond, 27 Mich. 462.

78. The affidavit from the office of the register of deeds is, when introduced in evidence, prima facie proof that service was made as therein set forth. Bourget v. Donaldson, 83 Mich. 478, 47 N. W. 326, and the recital in the sworn bill of the fact of service makes a prima facie case. Hannah & Lay Co. v. Mosser, 105 Mich. 18 (29), 62 N. W. 1120. Service of notice of lien not essential where claimant deals directly with owner. See §6 of Act; C. L. 1915 (14801), How. 2nd Ed. §13771, C. L. 1897 (10715).

79. Willard v. Magoon, 30 Mich. 273 (277-279).

80. Willard v. Magoon, 30 Mich. 273 (277-279).

terialmen to be paid in preference to his claim. Every material question of fact may be submitted to a jury in the discretion of the court as in ordinary chancery cases; and such trial shall be had, upon questions stated or upon issues formed under the direction of the court, or otherwise, as the court shall order.[81] On appeal the findings of a jury in a lien case are not decisive and binding but are "a merely provisional and assistant inquisition," and where, from the evidence, the court may form a decided opinion for itself, the points made on the rulings in the jury trial and in charging the jury, etc., will not be considered.[82]

§ 93. Defenses in Suits to Enforce Liens.[83]

That the lands upon which the improvements were made were, at the time of making the contract therefor, held by the husband and wife jointly, or were held and occupied as a homestead, and that the contract for the improvement was not in writing and signed by both the husband and wife, is a complete defense in a proceeding to enforce a lien, whether of contractor, subcontractor, materialman or laborer.[84] It has, however, been held that where the property was used and occupied as a homestead and the contract was signed only by the husband in whose name the title stood, the excess value over the homestead exemption of $1,500 was subject to the lien and the failure of the wife to sign was no defense to proceedings to reach the ex-

81. §11 of Act 179 of 1891, C. L. 1915 (14806), How. 2nd Ed. §13776, C. L. 1897 (10720).

82. Willard v. Magoon, 30 Mich. 273 (277-279).

83. Defenses to mechanics' liens. Boisot on Mechanics' Liens §§578-589; Kneeland on Mechanics' Liens, §§111-127a, 128-133, 134-146, 147-154, 155-169; 27 Cyc. 329-335. See Form No. 26 in appendix.

84. §2 of Act 179 of 1891, as amended by Act 143 of 1897; C. L. 1915 (14797), How. 2nd Ed. §13767, C. L. 1897 (10711); Bauer v. Long, 147 Mich. 351, 110 N. W. 1059; McMillan v. Schneider, 147 Mich. 264, 110 N. W. 961; Frolich v. Blackstock, 155 Mich. 604, 119 N. W. 906; Jossman v. Rice, 121 Mich. 270, 80 N. W. 25; Burtch v. McGibbon, 98 Mich. 139, 56 N. W. 1110; Lamont v. LeFevre, 96 Mich. 175, 55 N. W. 687; Deville v. Widoe, 64 Mich. 593, 31 N. W. 533; Holliday v. Mathewson, 146 Mich. 336, 109

cess.[85] It has also been held that where a husband contracts for building upon land belonging to his wife, and the evidence shows him to be her agent and shows a conspiracy by them to defraud lien claimants, her failure to sign the contract will be no defense and her land will be subjected to lien.[86] It is a good answer to the claim that the premises do not constitute a homestead, that they are in fact used in part for a homestead dwelling, though the remainder is used for business purposes.[87] It is a good defense to the claim of homestead in a house under construction that the defendants own and occupy another house at the same time.[88] It is a defense to a subcontractor's bill to foreclose a lien that the principal contractor is not made a party, and a defendant is not precluded by waiver from urging this defense by also urging the defense that the contract for construction on her land, was not her contract but that of her husband.[89] Where lien is claimed and sought to be enforced by the original contractor, it is a defense to the proceeding to enforce the lien that the sworn statement required by section 4 of the lien law was not furnished to the owner.[90]

N. W. 669; Frohlich v. Carroll, 127 Mich. 562, 86 N. W. 1034; King v. Welborn, 83 Mich. 195, 47 N. W. 106; McAllister v. DesRochers, 132 Mich. 382, 93 N. W. 887; Scott v. Keeth, 152 Mich. 547, 116 N. W. 183; McMonegal v. Wilson, 103 Mich. 265, 61 N. W. 495; Delray Lumber Co. v. Keohane, 132 Mich. 17, 92 N. W. 489; Godfrey Lumber Co. v. Kline, 160 Mich. 565, 125 N. W. 682; John Wallace Sons Co. v. Wilkinson, 181 Mich. 694, 148 N. W. 166; Restrick Lumber Co. v. Wyrembolski, 164 Mich. 71, 128 N. W. 1083; Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578 (579-583), 132 N. W. 117; Holland Furnace Co. v. Hartig, 181 Mich. 342 (346), 148 N. W. 169; Burman v. Ewald, 192 Mich. 293, 23 D. L. N. 449, 158 N. W. 853; Hammond v. Wells, 45 Mich. 11, 7 N. W. 218.

85. Scott v. Keeth, 152 Mich. 547 (551), 116 N. W. 183; McAllister v. DesRochers, 132 Mich. 382 (383), 93 N. W. 887; Lamont v. LeFevre, 96 Mich. 175 (176, 178), 55 N. W. 687; Holland Furnace Co. v. Hartig, 181 Mich. 342 (346), 148 N. W. 169.

86. Frohlich v. Carroll, 127 Mich. 561, 86 N. W. 1034.

87. Lamont v. LeFevre, 96 Mich. 175 (178), 55 N. W. 687.

88. McMonegal v. Wilson, 103 Mich. 264 (267-268), 61 N. W. 495; Delray Lumber Co. v. Keohane, 132 Mich. 17 (19), 92 N. W. 489.

89. Godfrey Lumber Co. v. Kline, 160 Mich. 565 (567), 125 N. W. 682.

90. §4 of Act 179 of 1891; C. L. 1915 (14799), How. 2nd Ed. §13769, C. L. 1897 (10713). Sterner v. Haas, 108 Mich. 488, 66 N. W. 348; Wiltsie v. Harvey, 114 Mich. 131, 72 N. W. 134;

This defense was permitted to be raised by an adverse lienor though the bill was taken as confessed against the owner.[91] It has been held a good defense to a lien that, after request by the owner and before suit the lien claimant failed to serve a statement of his claim within the statutory five day period.[92] A statement in the answer that the bill of complaint does not show performance of all conditions prerequisite to the enforcement of the lien sufficiently gives notice of the defense that the statement by the contractor under section 4 of amounts due laborers, materialmen, etc., was not furnished.[93] It is a defense to a proceeding to enforce a lien that the statutory notice of claim of lien was not properly served, by personal service upon the owner if he could have been found within the county, or upon the agent in charge within the county if it was not possible to serve the owner personally, or by proper substituted service if neither could be found within the county.[94] The defense of a defective proof of service, in that the affidavit endorsed upon a copy of the claim of lien, in which the owner was properly named, merely showed service on "him personally," though not naming the owner, will not be held good, especially where the defense is first

Barnard v. McLeod, 114 Mich. 73, 72 N. W. 24; Wildey v. Gillett, 171 Mich. 153 (157), 136 N. W. 1116; Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111, 82 N. W. 801; Walker v. Syms, 118 Mich. 183, 76 N. W. 320; Morton v. Eaton, 141 Mich. 444, 104 N. W. 726. See Maurer v. School District, 186 Mich. 223, 152 N. W. 999; Adams v. Central City Granite etc. Co., 154 Mich. 448 (458), 117 N. W. 932. But it is no defense that the original contractor delayed in serving his sworn statement upon the owner until after he had filed his claim of lien, provided both were done within the statutory period. Holliday v. Mathewson, 146 Mich. 336 (338), 109 N. W. 669. A contractor's failure to furnish the sworn statement, held a good defense, though the contractor and owner were the only parties interested. Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111 (113-14), 82 N. W. 801.

91. Wiltsie v. Harvey, 114 Mich. 131 (134), 72 N. W. 134.

92. Frohlich v. Beecher, 139 Mich. 278, 102 N. W. 736. See Rohde v. Weinberg, 156 Mich. 318, 120 N. W. 789.

93. Wildey v. Gillett, 171 Mich. 153 (157), 136 N. W. 1116.

94. Zilz v. Wilcox, 190 Mich. 486, 23 D. L. N. 24 (25), 157 N. W. 77; Hannah & Lay Co. v. Mosser, 105 Mich. 18 (21-25, 29-30), 62 N. W. 1120; Wiltsie v. Harvey, 114 Mich. 131 (133-134), 72 N. W. 134.

raised on appeal.[95] In a case where the wife owned the land and her husband contracted in his own behalf for a structure thereon and he was neither served with notice of claim of lien or joined as a defendant in proceedings against her to enforce within the statutory period, there was no enforceable lien against the land or structure.[96] Where the contractor sued to enforce a lien under an indivisible contract to furnish materials and labor or a contract to construct, it is a defense to the proceedings that he did not complete the contract according to its terms.[97] In case the contractor fails or refuses to complete his contract without fault on the part of the owner who is forced to complete, this constitutes a defense to such part of all lien claims whether of contractor, subcontractor, laborer or materialman as will bring the owner's outlay for construction plus amounts to which he is entitled for damages, etc., above the contract price, as the owner is entitled to completion in accordance with the contract at the contract price and to offset or recoup his damages against the same.[98] As a defense to a lien claim the owner may offset his claims against the contractor for failure to perform and recoup his damages for delay, for defects of construction and for other items.[99] He cannot,

95. Bourget v. Donaldson, 83 Mich. 478 (481-3), 47 N. W. 326.

96. Hall v. Erkfitz, 125 Mich. 332, 84 N. W. 310.

97. Here is an indivisible contract, by the terms of which nothing is due the contractor until the work is completed and accepted by the owner. By his own testimony complainant shows failure to complete on his part and failure to accept on the part of defendant. Under such a state of facts, the refusal to accept being reasonable, a bill will not lie to enforce a mechanics' lien for a balance claimed to be due. Evans v. Woodley, 173 Mich. 20 (21), 138 N. W. 275; Frohlich v. Klein, 160 Mich. 142, 125 N. W. 14.

98. Smalley v. Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797; Wells v. Board of Education, 78 Mich. 260, 44 N. W. 267; Yeomans v. Parker, 105 Mich. 323, 63 N. W. 316; Koch v. Sumner, 145 Mich. 358, 108 N. W. 725; Greilick Co. v. Rogers, 144 Mich. 314, 107 N. W. 885; J. W. Reedy Elevator Mfg. Co. v. Peck, 149 Mich. 657, 113 N. W. 300; Gier v. Daiber, 148 Mich. 190, 111 N. W. 773; Frohlich v. Klein, 160 Mich. 142, 125 N. W. 14; Hannah & Lay Co. v. Hartzell, 125 Mich. 177, 84 N. W. 52; Scott v. Keeth, 152 Mich. 547, 116 N. W. 183; 27 Cyc. 332-335.

99. Smalley v. Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797; Wells v. Board of Education, 78 Mich. 260, 44 N. W. 267; J. W. Reedy Elevator Mfg. Co. v. Peck, 149 Mich. 657, 113

however, after acceptance of the building as complying with the contract, defend and recoup against a materialman for defects in construction;[1] though the mere taking possession of the structure cannot of itself be treated as an unequivocal acceptance of performance;[2] and it cannot be said that a particular course of construction was approved by the owner because permitted by him without interference.[3] Minor defects in construction not called to the attention of the contractor with permission or opportunity to him to remedy them do not prevent a bill to enforce a lien.[4] A defendant may maintain a cross bill to recover damages sustained by a claimant's failure to perform his contract, but damages cannot be recouped unless affirmative relief is prayed.[5] That the name of the contractor as stated in the claim of lien was incorrect, was held a sufficient defense and it was held that the defect could not be cured by an amendment of the bill;[6] the failure to state in the claim of lien the true name of the owner, unless claimant's ignorance of the owner's true name is chargeable to the owner himself, is no defense to such owner.[7]

It is no defense that there is a variance between the pleadings and proof, if the defendant was not misled to his injury by the erroneous allegations,[8] nor that the statement or claim

N. W. 300; Kotcher v. Perrin, 149 Mich. 690, 113 N. W. 484; Frohlich v. Klein, 160 Mich. 142, 125 N. W. 14; Gier v. Daiber, 148 Mich. 190, 111 N. W. 773; Greilick Co. v. Rogers, 144 Mich. 314, 107 N. W. 885; Scott v. Keeth, 152 Mich. 547, 116 N. W. 183; Koch v. Sumner, 145 Mich. 358, 108 N. W. 725; Yeomans v. Parker, 105 Mich. 323, 63 N. W. 316; Frohlich v. Carroll, 127 Mich. 561 (566), 86 N. W. 1034.

1. Hannah & Lay Co. v. Hartzell, 125 Mich. 177, 84 N. W. 52.

2. Gier v. Daiber, 148 Mich. 190 (193), 111 N. W. 773; Frohlich v. Klein, 160 Mich. 144, 125 N. W. 14.

3. Boots v. Steinberg, 100 Mich. 134 (137-138), 58 N. W. 657.

4. Gier v. Daiber, 148 Mich. 191 (194), 111 N. W. 773; Frohlich v. Carroll, 127 Mich. 561 (565), 86 N. W. 1034.

5. Scott v. Keeth, 152 Mich. 547 (550), 116 N. W. 183; J. W. Reedy Elevator Mfg. Co. v. Peck, 149 Mich. 657 (667), 113 N. W. 300.

6. Lacy v. Piatt Power Co., 157 Mich. 544, 122 N. W. 112.

7. Waters v. Johnson, 134 Mich. 436, 96 N. W. 504; Frohlich v. Carroll, 127 Mich. 561 (565-566), 86 N. W. 1034.

8. Zilz v. Wilcox, 190 Mich. 486, 23 D. L. N. 24 (26), 157 N. W. 77.

of lien states that the material or labor was furnished under one contract, while the bill and proofs mention such work or material as furnished under two contracts.[9] An intentional claiming of greater amounts than due, or the inclusion of speculative items or the proportioning between jobs arbitrarily, or any conduct on the part of the lien claimant amounting to an intentional misrepresentation or fraud will be sufficient to invalidate or prevent acquirement of the lien and is a defense.[10] An unintentional claiming of an excessive amount through honest mistake will not prevent acquirement of or invalidate a lien, where there is no intent or effort to place a lien for a greater amount than the claimant honestly believed due.[11] Where the contract provided there should be no charge for extras unless agreed to in writing, this was held a defense to a lien for extras

9. Lamont v. LeFevre, 96 Mich. 175 (176-177), 55 N. W. 687.

10. Gibbs v. Hanchette, 90 Mich. 657, 51 N. W. 691; Griff v. Clark, 155 Mich. 611, (613), 119 N. W. 1076, 29 L. R. A. (N. S.) 305. Lien laws are recognized as harsh remedies, and when, as by our statute, parties are required to file "just and true statements of the demands, over and above all legal set-offs," equity treats as insufficient a statement which is largely excessive. Parties are not permitted to include speculative items in their claims, thereby incumbering the lands of others with untrue and unjust claims; and, as the means of information is within their reach, they are held to a degree of accuracy greater than may be necessary in mere actions upon demands. Brennan v. Miller, 97 Mich. 182 (185), 56 N. W. 354. This court has frequently said, these lien proceedings are harsh and must be strictly followed, and the law will not permit one to recklessly make an affidavit of the amount due without any knowledge, thinking he may afterwards correct it, when, in fact, the claim made is 25 per cent. too large. This statement, when filed, creates the lien, and the law excuses only an honest mistake in stating the amount due, made by one cognizant of the facts. Greilick Co. v. Taylor, 143 Mich. 704 (709), 107 N. W. 712; Hannah & Lay Co. v. Mosser, 105 Mich. 19 (25), 62 N. W. 1120.

11. McAllister v. DesRochers, 132 Mich. 381 (383); Scheibner v. Cohnen, 108 Mich. 165, 65 N. W. 760; McMonegal v. Wilson, 103 Mich. 264, 61 N. W. 495; Union Trust Co. v. Casserly, 127 Mich. 184, 56 N. W. 545; Fairbairn v. Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469; Hulburt v. Just, 126 Mich. 337, 85 N. W. 872; Frohlich v. Carroll, 127 Mich. 561 (565), 86 N. W. 1034; Frohlich v. Ashton, 159 Mich. 265 (267-268), 123 N. W. 1130; Vaughan v. Ford, 162 Mich. 37 (45), 127 N. W. 280; Gibbs v. Hanchette, 90 Mich. 657 (661), 51 N. W. 691; Lamont v. LeFevre, 96 Mich. 175 (176-177), 55 N. W. 687; Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 23 D. L. N. 73 (77-78), 157 N. W. 96.

furnished upon verbal demand.[12] Recoupment of damages by an owner for the contractor's failure to perform was not allowed as a defense to liens of subcontractors and others where, disallowing the unauthorized payments to the contractor, sufficient remained to pay the owner's damages and the liens claimed.[13] It is a defense that the materials for which lien is claimed were not ordered for use in any particular structure, even though they may subsequently have been used in the structure under contract.[14] It is a defense that materials ordered by a contractor and in good faith furnished for use in a building were not used therein but were sold by him to a third party and not delivered on the land,[15] and the date of furnishing materials not used cannot fix the date of delivery of the last of the materials to the building.[16] Tender of payment and refusal to accept is a good defense to a lien.[17] Where the subcontractor guaranteed performance of a building contract and directed payments to be made to the principal contractor, that was held a sufficient defense to his claiming a lien upon the building which was abandoned by the contractor and completed by the owner, at least until other lienors had been paid.[18] The

12. Gier v. Daiber, 148 Mich. 190 (195), 111 N. W. 773.

13. Greilick Co. v. Rogers, 144 Mich. 313 (317), 107 N. W. 885.

14. Van Cleve Glass Co. v. Erratt, 110 Mich. 689, 68 N. W. 978; see Stout v. Sawyer, 37 Mich. 313 (315-316).

15. North v. Globe Fence Co., 144 Mich. 557 (558), 108 N. W. 285; Battle Creek Lumber Co. v. Poland, 150 Mich. 690 (692), 114 N. W. 671; Smalley v. Gearing, 121 Mich. 190 (203), 79 N. W. 1114, 80 N. W. 797.

16. Smalley v. Gearing, 121 Mich. 190 (202-203), 79 N. W. 1114, 80 N. W. 797; Battle Creek Lumber Co. v. Poland, 150 Mich. 690 (693), 114 N. W. 671.

17. The complainant, having refused to accept payment for the materials which were purchased subsequent to the giving of the note, has waived her right to a lien for the amount of those materials also. She having waived her right to claim a lien for the amount of the materials purchased up to the time the note was given, and that amount having become the mere debt of the defendant, her refusal to accept payment for the materials purchased after that time, when payment was offered, together with the reason given by her, that "she would collect it all together," must be held to be a waiver of her right to claim a lien therefor, and an election on her part to treat the whole amount due her as the personal debt of the defendant. Blakeley v. Moshier, 94 Mich. 303-304, 54 N. W. 54; Moynahan v. Moore, 9 Mich. 9.

18. Frohlich v. Ashton, 164 Mich. 132 (134), 129 N. W. 18;

defense of former adjudication was held to be sufficiently answered by a showing that the previous order of adjudication had been vacated on complainant's motion subsequent to the filing of its bill.[19] Where the lien was claimed in the interests of a partnership it was held a defense that it was sworn to before one of the partners.[20] It is no defense to a bill to foreclose a mechanic's lien that the plaintiff conducted its business under an assumed name in violation of law[21] where the assumed name included plaintiff's name and no fictitious or misleading name appeared therein.[22] It is no defense to a proceeding by a subcontractor to enforce his lien that he failed to serve on the owner the statement that he was furnishing materials, provided for in section 1,[23] where he is the sole lien claimant and the principal contractor admits the correctness of his claim and the owner pays out the last of the funds applicable to the contract with full knowledge of his claim.[24] Where the plaintiff, a contractor, put his labor and material into the building and claimed, and the lower court, from examination of the evidence and after examination of the building, found substantial compliance with his contract, and there was ample opportunity for the defendant owner to show the cost to make good alleged defects but he did not do so, the claim to lien was upheld,[25] and the request to refer the case back

Fairbairn v. Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469.

19. Lowrie & Robinson Lumber Co. v. Campbell Ave. M. E. Church, 170 Mich. 341 (344), 136 N. W. 364.

20. Smalley v. Bodinus, 120 Mich. 363, 79 N. W. 567. It may be possible to draw a distinction between an acknowledgment and an affidavit; but it seems to us that the same reason forbids official action by one who is to be benefited in both cases. Perhaps no great hardship would result should this affidavit be held valid, inasmuch as it has in no way misled any one, and furthermore states the truth; but the rule, once established, would be applicable to other affidavits, where the dangers of the practice would be more apparent.

21. Act 101 of 1907, C. L. 1915 (6349)-(6353), How. 2nd Ed. §§2626-2630.

22. Hagar v. Schliess, 184 Mich. 472, 151 N. W. 552; 183 Mich. 610, 149 N. W. 1058.

23. C. L. 1915 (14796), How. 2nd Ed. §13766, C. L. 1897 (10710).

24. Green Bay Cut Stone Co. v. Fabry, 169 Mich. 544 (549), 135 N. W. 312.

25. Frederick v. Willis, 176 Mich. 106-108, 142 N. W. 342.

for additional proofs was refused. Nor was it a defense that the notice of filing the statement or claim of lien as required under section 3 of Act 216 of 1885, was not served on the owner, where the contract out of which the claim of lien arose was made with the owner.[26] It has been held no defense to the owner that the lien claimant failed to complete the building in minor details when such failure was caused by the unjust and unreasonable demands of the owner.[27] An unintentional misstatement of the date of furnishing the first and last materials will not be fatal where the claim was in fact filed within 60 days from the furnishing of the last of the material and defendant suffered no prejudice.[28] Where a claim of lien verified by one partner states the existence of the partnership, gives the names of its members and states that the affidavit is made in their behalf, it properly shows authority to make and verify claim of lien and no sufficient defense is shown.[29] That complainant's book account against the contractor contained other charges than those relating to the building in question is not of itself sufficient to show a waiver of his right to lien.[30] It is no defense that a subcontractor's statement was not properly verified because sworn to before the attorney-notary public who prepared it, where he was not attorney of record in the cause.[31] It was held a good defense that a bill to enforce a lien failed to state that respondent was either owner, part owner, or lessee of the land upon which lien was sought to be enforced, or that he held any interest therein, and such failure was held not cured by an admission in the answer that respondent was owner, where she denied that the claimed contract related to that land.[32] It is a good defense

26. Lamont v. LeFevre, 96 Mich. 175 (177-178), 55 N. W. 687.
27. McMonegal v. Wilson, 103 Mich. 264 (266, 268), 61 N. W. 495.
28. Union Trust Co. v. Casserly, 127 Mich. 183 (185), 86 N. W. 545.
29. Yeomans v. Parker, 105 Mich. 323 (324), 63 N. W. 316.
30. Union Trust Co. v. Casserly, 127 Mich. 183 (185), 86 N. W. 545.
31. Zilz v. Wilcox, 190 Mich. 486, 23 D. L. N. 24 (26), 157 N. W. 77.
32. Clark v. Raymond, 27 Mich. 456 (460).

for the owner that he is not a party to the contract for the improvement.[33] It was held a good defense to a lien upon land that the contract for improvements thereon contained no description of the land.[34] Under Act 216 of 1885 it was held no defense to the attaching of a lien that notice was not served upon the owner or other party in interest, where bona fide rights had not intervened.[35]

§ 94. Appeals.

The right of appeal is purely statutory.[36] In any case where a motion to dismiss, based upon jurisdictional grounds or upon issues which, previous to the Judicature Act of 1915, would have been raised by demurrer, plea to the jurisdiction or other dilatory plea, is passed upon, or a decree or final order under the provisions of the lien act is made by any circuit court in chancery, either party who may consider himself aggrieved by such action, order or decree may appeal therefrom to the supreme court, in the same manner as is provided by law for appeals in ordinary chancery cases, the right of appeal in mechanics' lien cases being governed by the general laws applicable to chancery appeals.[37]

33. Merrill v. Brant, 175 Mich. 182 (184-185), 141 N. W. 550; John Wallace Sons Co. v. Wilkinson, 181 Mich. 693 (699), 148 N. W. 166; Holland Furnace Co. v. Hartig, 181 Mich. 342 (344-346), 148 N. W. 169.

34. Hammond v. Wells, 45 Mich. 11 (12-13), 7 N. W. 218.

35. Kirkwood v. Hoxie, 95 Mich. 62 (64), 54 N. W. 720; Lamont v. LeFevre, 96 Mich. 175 (177-178), 55 N. W. 687; McMonegal v. Wilson, 103 Mich. 264 (266), 61 N. W. 495.

36. Willard v. Magoon, 30 Mich. 273 (276); Clark v. Raymond, 26 Mich. 415. For forms used on appeal, see Forms No. 40 to 43 inclusive, in appendix.

37. Judicature Act, Act 314 of 1915, Chap. L, §§18-26, Cummings & Beecher, §§1875-1883; C. L. 1915 (13753-13761); 27 Cyc. 452-460; see also §27 of Act 179 of 1891 as amended by Act 143 of 1897; C. L. 1915 (14822), How. 2nd Ed. §13792, C. L. 1897 (10736); The usual rules applicable in chancery proceedings were applied to a bill to foreclose a mechanics' lien in determining that an order overruling a plea upon which defendant relied, was final and appealable. Hagar v. Schliess, 183 Mich. 610, 149 N. W. 1058. Where the lower court awarded certain amounts to the respective lien claimants and the defendant owner, on appeal,

Act 84 of 1873,[38] specifically giving a right of appeal in such cases, was superseded and expressly repealed by the Judicature Act.[39] The cases applicable to the right of appeal as heretofore existing are referred to hereinbefore and in this note.[40]

claimed these amounts were excessive, but did not point out any error in the lower court's computation or any improper application of the rule governing the same, or the evidence upon which such computation should be based, it was held the decree of the lower court should be affirmed. Frohlich v. Carroll, 127 Mich. 561 (506-567), 86 N. W. 1034.

38. How 2nd Ed. §§13814-13816, C. L. 1897 (10740-10742).

39. Act 314 of 1915, Chap. LXXXI, 11; C. L. 1915 (14465).

40. Clark v. Raymond, 26 Mich. 415; Willard v. Magoon, 30 Mich. 277; Roberts v. Miller, 31 Mich. 73; Begin v. Henderson, 50 Mich. 468, 15 N. W. 554. Appeals in proceedings to enforce liens: Boisot on Mechanics' Liens, §§675-686; Phillips on Mechanics' Liens, 3rd Ed. §§465-466; 27 Cyc. 452-460.

CHAPTER XIII

DETERMINATION, FINAL DECREE AND SUBSEQUENT PROCEEDINGS.*

§ 95. Final Decree.
96. Costs and Attorneys' Fees.
97. Sale and Redemption.
98. Disposition of Proceeds and Surplus.
99. Postponement of Distribution.
100. Priorities of Attaching Creditors.
101. Disposition of Surplus.

§ 95. Final Decree.

Upon final decree the court may order a sale of the buildings or machinery separately, or the lands, buildings, machinery, structure or improvements together, by a circuit court commissioner or receiver, or may order the property into the hands of a receiver to be leased or rented from time to time under the direction of the court until the liens are discharged, or make such other order or disposition of the premises as justice requires. If upon the coming in and confirmation of the final report any portion of the liens are still unpaid, the court may enter personal decree for the same against any party personally liable therefor, and execution may issue as upon other personal decrees.[1] All claims draw

*In general as to the subjects comprehended in Chapter XIII, see Title "Mechanics' Liens," 34 Cent. Dig. §§591-654, and 13 Dec. Dig. §§290-310.

1. §14 of Act 179 of 1891, C. L. 1915 (14809), How. 2nd Ed. §13779, C. L. 1897 (10723). Judgment or decree in suit to enforce lien. See Boisot on Mechanics' Liens, §§649-674; Phillips on Mechanics' Liens, 3rd Ed. §§446-457; 27 Cyc. 428-443. Upon right to personal judgment. See Notes, 22 Am. & Eng. Ann. Cas. 129-135; 14 L. R. A. (N. S.) 1036; 24 Id. 321; Jones on Liens, 3rd Ed. §1614; Rockel on Mechanics' Liens, §§287, 289-292; Boisot on Mechanics' Liens,

interest from the time they are due.[2] The final decree in a lien proceeding, if the lien is sustained, should expressly adjudge the existence of contract relations between the parties and the establishment of the alleged lien upon the described property.[3] Where, while claiming the lienors were allowed too much, the defendant does not point out errors in the rules applied or inaccuracy in the computations made by the trial court, the decree will not be disturbed on appeal.[4] In the adjudication of the questions in controversy the court of chancery may, upon proper pleadings after having acquired jurisdiction by reason of the setting forth of questions of equitable consideration, adjudicate all rights of, and disputes between, the parties relative to the subject matter, even going to the extent of giving a personal decree against certain of the parties.[5] An execution to collect a money decree is permitted and may be ordered in a suit to foreclose a lien, without awaiting a sale showing a deficiency.[6] In proceedings to enforce liens all persons having rights in the property as well as all sureties on indemnity bonds may be made parties, and the court is thereupon required to settle and determine the rights and liabilities of all parties in the matter, and make such decree as is necessary to determine and enforce the rights and liabilities of the various parties including such surety or sureties.[7] A decree upon a bill to foreclose a lien is not *res adjudicata* as to one claiming title but not a party.[8] The court is re-

§§651-654. See: Koepke v. Dyer, 80 Mich. 311, 45 N. W. 143; Kirkwood v. Hoxie, 95 Mich. 62, 54 N. W. 720.

2. Smalley v. Gearing, 121 Mich. 190 (205), 79 N. W. 1114, 80 N. W. 797.

3. Willard v. Magoon, 30 Mich. 273 (281).

4. Frohlich v. Carroll, 127 Mich. 561 (567), 86 N. W. 828.

5. Koch v. Sumner, 145 Mich. 358 (359-365), 108 N. W. 725; 27 Cyc. 432-438. See Vaughan v. Wayne Circuit Judge, 153 Mich. 478 (480), 116 N. W. 1080. For decree, see Form No. 39 in appendix.

6. Scott v. Keeth, 152 Mich. 547 (553), 116 N. W. 183.

7. §10 of Act 179 of 1891, as amended by Act 394 of 1913, C. L. 1915 (14805), How. 2nd Ed. §13775, C. L. 1897 (10719). See Koch v. Sumner, 145 Mich. 358 (365), 108 N. W. 725; Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 23 D. L. N. 73 (78), 157 N. W. 96.

8. Fowler v. Blount, 191 Mich.

quired to examine all claims that are presented, and ascertain and determine the amount due each creditor who has a lien of the kind mentioned in the statute, upon the estate in question, and every such claim that is due absolutely and without conditions, although not then payable, is required to be allowed, with a rebate of interest to the time it would become payable.[9] When the owner, part owner or lessee has failed to perform his part of the contract, and by reason thereof, the other party, without his default has been prevented from completely performing his part, he is entitled to a reasonable compensation for as much thereof as he has performed, in proportion to the price stipulated for the whole, and the court must adjust his claim accordingly.[10]

§ 96. Costs and Attorneys' Fees.

The costs in all cases are subject to the discretion of the court and are to be paid from the proceeds of the sale, or by any parties to the suit, as justice and equity require.[11] The court may, in its discretion, allow a reasonable attorney's fee when judgment is rendered in such proceeding, in favor of the parties succeeding therein.[12] Where one record and one brief was filed in several cases, it was held on the dismissal of the original bills and a cross-bill that but one solicitor's fee would be taxed for defendant owner,[13] and

575, 23 D. L. N. 308 (310), 158 N. W. 114.

9. §12 of Act 179 of 1891 as amended by Act 143 of 1897, C. L. 1915 (14807), How. 2nd Ed. §13777, C. L. 1897 (10721); Wagar v. Briscoe, 38 Mich. 587 (594).

10. §13 of Act 179 of 1891; C. L. 1915 (14808), How. 2nd Ed. §13778, C. L. 1897 (10722). As to rights upon failure to complete, see §§29, 34, 35 and 37; Jewell v. Paron, 94 Mich. 84 (86), 53 N. W. 951.

11. §21 of Act 179 of 1891; C. L. 1915 (14816), How. 2nd Ed. §13786, C. L. 1897 (10730); 27 Cyc. 460-464. See Halpin v. Garman, 192 Mich. 71, 23 D. L. N. 421, (423), 158 N. W. 29; Gier v. Daiber, 148 Mich. 190 (196), 111 N. W. 773. Costs and attorney's fees in proceeding to enforce lien. Jones on Liens, 3rd Ed. §§1616-1616a; Rockel on Mechanics' Liens, §§299-302; Boisot on Mechanics' Liens, §§673-674; Phillips on Mechanics' Liens, 3rd Ed §§467-468.

12. §12 of Act 179 of 1891 as amended by Act 143 of 1897, C. L. 1915 (14807), How. 2nd Ed. §13777, C. L. 1897 (10721); 27 Cyc. 462-464.

13. Hannah & Lay Co. v. Mos-

where costs were allowed against owners in favor of complainant and defendant lienors, but one set of costs was permitted, to be divided between the parties entitled.[14] In mechanics' liens cases the plaintiff is entitled to not only a reasonable solicitor's fee but to his actual disbursements.[15] Where the land owner appeared and answered the bill of the subcontractor, disclosed the exact amount unpaid and offered to pay the person entitled thereto, the same being claimed by an assignee of the contractor, such owner was held entitled to costs.[16] On appeal, where the defect upon which the decree was reversed appeared on the face of the bill but was not objected to by defendant in the lower court, no costs were awarded either party.[17]

§ 97. Sale and Redemption.

If any part of the premises can be separated from the residue and sold without damage to the whole, and if the value thereof is sufficient to satisfy all the claims proved in the case, the court may order a sale of that part, if it appears to be most for the interest of all parties concerned.[18] Sales under such decrees are to be made in the same manner as in ordinary cases of mortgage foreclosure unless otherwise directed by the court;[19] and all lands sold under such order or decree may be redeemed at any time within fifteen

ser, 105 Mich. 18 (31), 62 N. W. 1120.

14. Smalley v. Gearing, 121 Mich. 190 (206), 79 N. W. 1114, 80 N. W. 797.

15. Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 157 N. W. 96; Wisniewski v. Nawrocki, 153 Mich. 523, 116 N. W. 1065.

16. Bourget v. Donaldson, 83 Mich. 478 (486), 47 N. W. 326.

17. Clark v. Raymond, 27 Mich. 456 (462).

18. §15 of Act 179 of 1891, C. L. 1915 (14810), How. 2nd Ed. §13780, C. L. 1897 (10724); Wagar v. Briscoe, 38 Mich. 587 (595); Peninsular General Electric Co. v. Norris, 100 Mich. 502, 59 N. W. 151. The sale may be of buildings separately or with the land but does not permit any severance which will damage either land or buildings. Eaton v. City of Monroe, 63 Mich. 525 (527), 29 N. W. 885. Sale of property to satisfy liens and distribution of proceeds. Boisot on Mechanics' Liens, §§687-701; Phillips on Mechanics' Liens, 3rd Ed. §§458-464; 27 Cyc. 443-450.

19. §19 of Act 179 of 1891, C. L. 1915 (14814), How. 2nd Ed. §13784, C. L. 1897 (10728); See Wagar v. Briscoe, 38 Mich.

months from the time of filing bill for foreclosure.[20] As the decree can ordinarily reach only the interest of the person making the contract for the structure or improvement it follows that only that interest can be sold.[21] In cases where a new structure is erected upon land to which the person contracting has no title, only the structure can be sold; and where structures or machinery are added to the land by a tenant or vendee, they, together with the tenant's lease or vendee's contract, are subjected to lien though ordinarily only the structure or machinery and the interest of the tenant or vendee in the premises by reason of his lease or contract, is subject to sale.[22] In cases where the excess over a homestead interest is subject to lien under contract with the husband for construction upon or improvement of lands to which he has title, the premises may be sold to permit the separation of the homestead interest and the enforcement of the lien as to the remainder.[23]

§ 98. Disposition of Proceeds and Surplus.

If the claims against the estate are all ascertained at the time of ordering sale, the court may then order the officer to pay over and distribute the proceeds of the sale, after deducting all lawful charges and expenses, to and among the several creditors to the amount of their respective claims,

590 (592). The procedure for the foreclosure of mortgages is set forth in the Judicature Act, Act 314 of 1915, Chap. XIX, §§22-38; Cummings & Beecher §§799-815, C. L. 1915 (12676)-(12692).

20. §19 of Act 179 of 1891 C. L. 1915 (14814), How. 2nd Ed. §13784, C. L. 1897 (10728), See 27 Cyc. 450-451.

21. Wagar v. Briscoe, 38 Mich. 587 (596).

22. Peninsular General Electric Co. v. Norris, 100 Mich. 496 (502-506), 59 N. W. 151. A different rule might, however apply to structures added by lessee to the land under express contract with the owner. See §11, Lessees and Vendees.

23. To the amount of $1,500 the homestead was exempt from this lien. Beyond that sum the lien attaches, and, as the premises cannot be divided, a sale affords the only means of reaching the excess. To hold that it could not be reached because indivisible would be to do violence to the plain intent of the statute, which, while it aims to afford every one a shelter, was not designed to enable one to defeat his creditors by so constructing valuable property as to make it difficult to divide it. Lamont v. LaFevre, 96 Mich. 178, 55 N. W. 687.

if there is sufficient therefor; and if there is not sufficient, then to divide and distribute the same among the creditors in proportion to the amount due each: *Provided* such original contractor is to be subrogated to the rights of his subcontractors, materialmen and laborers, who shall first be paid in full; and the subcontractors are to be subrogated to the rights of their materialmen and laborers, who shall first be paid in full.[24] Where the balance remaining on the contract is insufficient to pay the claims in full, in computing the percentage of his entire claim to which each lienor is entitled, there should be included in arriving at the cost of the building, the sum of the payments actually made by the owner and paid to materialmen and laborers for labor and materials actually used in the building, and the enforceable liens, but claims which are not enforceable against the owner should not be included.[25] The owner is relieved from liability to the extent to which his payments have been distributed among subcontractors, materialmen or laborers, though the money they received is not the identical money paid by the owner to the contractor. Where the contractor furnishes materials, their value is to be included in determining the amount to be distributed. Pro rata distribution among all claimants is contemplated and the owner is not ordinarily entitled to credit for amounts received by a claimant in excess of his proportionate share.[26] In determining the cost of a structure, in order to ascertain for what proportion of their demands claimants are entitled to liens, payments made by the owner without requiring the sworn statement from the contractor, which went to pay for materials or labor actually going into the structure, are to be included. All a lienor can claim is that the contract price must be apportioned among subcontractors and those fur-

24. §16 of 179 of 1891, C. L. 1915 (14811), How. 2nd Ed. §13781, C. L. 1897 (10725). See §§37 and 40.

25. Frohlich v. Ashton, 164 Mich. 132 (134), 129 N. W. 18; overruling decision in same case in 159 Mich. 265, 123 N. W. 1130.

26. Smalley v. Gearing, 121 Mich. 191 (201), 79 N. W. 1114, 80. N. W. 1049.

nishing materials and labor, and where the cost of a completed structure exceeds the contract price, the lien claimant is entitled to such proportion of his claim as the contract price bears to the cost of the completed structure.[27] Where, after the owner made payments to the contractor without requiring the sworn statement under section 4, the contractor abandoned his contract and the owner completed the building, it was held that the amounts paid by the contractor to subcontractors, laborers and materialmen for labor or materials actually used in the structure together with outstanding liens and the cost to the owner to complete, divided into the contract price, gives the per cent of his claim each lienor is entitled to recover.[28] A materialman receiving payments while the materials were being furnished, from the contractor who did not direct their application, had the right to apply them on charges other than those for materials entering into the building in question.[29] Payments by the owner without requiring from the contractor the sworn statement under section 4 are at the owner's risk, and his property is not relieved from lien because he believed the previous advances to material men on the contractor's order paid them in full, where they did not mislead him into that belief.[30] Though payments made by the owner are founded on the contractor's sworn statement under section 4, they must be distributed pro rata, among all claimants of whom such owner has notice in order to protect him against liens,[31] and payments made without requiring such sworn statement and not distributed pro rata, cannot be allowed in the owner's favor as against a materialman's lien.[32]

27. Godfrey Lumber Co. v. Cole, 151 Mich. 280, 114 N. W. 1018; Frohlich v. Ashton, 159 Mich. 265, 123 N. W. 1130, reviewed in same case 164 Mich. 132 (134), 129 N. W. 18.

28. Kotcher v. Perrin, 149 Mich. 690 (692), 113 N. W. 284.

29. Union Trust Co. v. Casserly, 127 Mich. 183 (186), 86 N. W. 585.

30. Munroe v. Merrell, 113 Mich. 491 (492), 71 N. W. 850.

31. Frohlich v. Carroll, 127 Mich. 562 (566-7), 86 N. W. 1034.

32. Greilick Co. v. Rogers, 144 Mich. 314 (317), 107 N. W. 885; Hannah & Lay Co. v. Hartzell, 125 Mich. 177, 84 N. W. 52; Fairbairn v. Moody, 116 Mich. 61 (65), 74 N. W. 386, 75 N. W. 469.

§ 99. Postponement of Distribution.

If the claims have not been ascertained when the sale is ordered, or if for any other reason it is deemed proper to postpone the order of distribution, the court may direct the officer to bring the proceeds of sale into court to be disposed of according to its order; and if in consequence of the claims of attaching creditors, or for other causes, the whole cannot be properly distributed at once, the court may make two or more successive orders of distribution as the circumstances may require.[33]

§ 100. Priorities of Attaching Creditors.

When there are several attaching creditors they are, as between themselves, entitled to be paid according to the order of their respective attachments, but when several creditors entitled to liens have equal rights as between themselves, and the fund is insufficient to pay the whole they will share equally in proportion to their respective claims.[34]

§ 101. Disposition of Surplus.

If there is any surplus of the proceeds of the sale, after making all the payments required, it shall be forthwith paid over to the owner, part owner, lessee, or other person entitled; but such surplus may be attached or taken on execution in like manner as if it proceeded from a sale under execution.[35]

33. §17 of Act 179 of 1891, C. L. 1915 (14812), How. 2nd Ed. §13782, C. L. 1897 (10726).

34. §20 of Act 179 of 1891, C. L. 1915 (14815), How. 2nd Ed. §13785, C. L. 1897 (10729). §9 of Act 179 of 1891 as amended by Act 199 of 1893 and Act 143 of 1897, C. L. 1915 (14804), How. 2nd Ed. §13774, C. L. 1897 (10718). See §83 upon question of priorities.

35. §18 of Act 179 of 1891, C. L. 1915 (14813), How. 2nd Ed. §13783, C. L. 1897 (10727); Wagar v. Briscoe, 38 Mich. 587 (594).

CHAPTER XIV.

LIENS UNDER OTHER STATUTES.

§ 102. Liens Under Other Statutes.

§ 102. Liens Under Other Statutes.

Liens are also given by statute for labor in various instances and under various conditions: thus, labor rendered for street and steam railroad companies, if unpaid for, entitles the claimant to a lien against the railroad property which is preferred to other claims.[1] Labor for corporations mining coal, shale and clay is also entitled to preferred liens[2] as are miners of and workers in other mineral products in the upper peninsula for their labor.[3] Those who labor in manufacturing lumber or in connection with forest products in their various forms, are entitled to lien thereon for the amount due for labor and services, to be claimed within thirty days from the last day of labor or service.[4] Labor by mechanics, artisans and tradesmen, upon or in respect to personal property, including the care of live stock, entitles the claimant to a lien thereon for his labor, skill and materials, which he is entitled to enforce by suit, meanwhile retaining possession.[5] Labor liens are also given against pipe line companies.[6] Liens to be asserted within twenty

1. Act 110 of 1899, C. L. 1915 (8339)-(8340), How. 2nd Ed. §§13799-13801.

2. Act 254 of 1909, C. L. 1915 (14841), How. 2nd Ed. §13802.

3. Act 201 of 1867, C. L. 1915 (14840), How. 2nd Ed. §13813, C. L. 1897 §10755.

4. Act 229 of 1887 as amended, C. L. 1915 (14843)-(14858), How. 2nd Ed. §§13843-13858, C. L. 1897 (10756)-(10770).

5. Chap. 126 of 1846 as amended by Act 83 of 1873, C. L. 1915 (14831)-(14839), How. 2nd Ed. §§13804-13812, C. L. 1897 (10746)-(10754), C. L. 1915 (14833) amended by Act 331 of 1917.

6. C. L. 1915 (8598), How. 2nd Ed. §7266, C. L. 1897 (6492).

days are also given to threshers of grain and vegetable products for the value of their services,[7] and liens upon the animal shod are given to horseshoers to be asserted within 60 days for charges for shoeing any animal.[8] Owners of stallions are also entitled to lien for the service fee upon the mare and upon the get for 18 months after service date.[9] Garage keepers are also entitled to lien for labor, materials, supplies and storage upon vehicles stored, maintained, supplied or repaired and for enforcement may detain, advertise and sell the vehicle at any time it is in his possession within 90 days after the last labor or supplies are furnished.[10] Claims for death or personal injury against street or steam railways are, after judgment, made preferred liens upon the corporate assets and property rights, and franchises.[11] Liens upon public buildings and works are obviated by the requirement of security from the contractors in the form of a bond,[12] and upon railroads by requiring them to pay labor and material claims arising upon construction or repair directly instead of to the contractor.[13]

Other liens are given as follows: To the proprietors of mills upon the rents and profits thereof for their advances.[14] Upon drifted or floated logs and forest products for damages and expenses.[15] By keeper of hotel, inn, boarding or lodging house upon baggage and effects of guests, boarders and lodgers for customary charges for food and lodging.[16]

7. Act 116 of 1911 as amended by Act 92 of 1913, C. L. 1915 (14872)-(14880), How. 2nd Ed. §§13817-13825.

8. Act 160 of 1897, C. L. 1915 (14859)-(14871), How. 2nd Ed. §§13826-13838, C. L. 1897 (10771)-(10783).

9. Act 44 of 1915, C. L. 1915 (14881)-(14890). See C. L. 1897 (10749)-(10752).

10. Act 312 of 1915, C. L. 1915 (4833)-(4835).

11. Act 110 of 1899, C. L. 1915 (8340)-(8341), How. 2nd. Ed. §§13800-13801.

12. Act 187 of 1905, C. L. 1915 (14827)-(14830). See How. 2nd Ed. §§13839-13842. This law is fully annotated on pages 194-201 of this work (136)-(139). See Forms No. 13 to 16 inclusive, in appendix.

13. C. L. 1915 (8336)-(8338), How. 2nd Ed. §§6708-6710, C. L. 1897 (5243)-(5245).

14. C. L. 1915 (6637), How. 2nd Ed. §2906, C. L. 1897 (5062).

15. C. L. 1915 (6673), How. 2nd Ed. §4160, C. L. 1897 (5098).

16. C. L. 1915 (6947)-(6953), How. 2nd Ed. §§4208-4214, C. L. 1897 (5317)-(5323).

Upon forest products for services in breaking jams, running or driving logs and clearing banks, etc.[17] Upon vessels and water craft for certain specified debts and damages.[18] By trust and deposit companies for storage charges, etc., on valuables.[19] By warehouse men for storage charges and moneys advanced for cartage, insurance, etc.[20] Upon real and personal property designated in the decree, for permanent alimony.[21] By railroad companies for food, water and care of animals during transportation.[22] By canal and harbor companies upon vessels for tolls and charges.[23] By mutual insurance companies for assessments and premiums.[24] Upon the interests of certain members of water power companies for assessments.[25] In favor of corporations organized under the manufacturing and mercantile law against their members for any debts due from them.[26]

17. C. L. 1915 (6649)-(6653), How. 2nd Ed. §§4137-4140, C. L. 1897 (5075)-(5078); C. L. 1915 (8646)-(8647), How. 2nd Ed. §§7378-7379, C. L. 1897 (6741)-(6742); C. L. 1915 (8860)-(8861), How. 2nd Ed. §§7397-7398, C. L. 1897 (6760)-(6761), C. L. 1915 (8626)-(8627), How. 2nd Ed. §§7481-7482, C. L. 1897 (6520)-6521), C. L. 1915 (8642)-(8646), How. 2nd Ed. §§7497-7502, C. L. 1897 (6536)-(6541).

18. C. L. 1915 (14892), How. 2nd Ed. §13625, C. L. 1897 (10789).

19. C. L. 1915 (8053), How. 2nd. Ed. §6484, C. L. 1897 (6164).

20. C. L. 1915 (6537)-(6540), How. 2nd Ed. §§3029-3032, C. L. 1897 (5031)-(5034); C. L. 1915 (6589)-(6597), How. 2nd Ed. §§2995-3003.

21. C. L. 1915 (11416), How. 2nd Ed. §11477, C. L. 1897 (8640).

22. C. L. 1915 (15538), How. 2nd Ed. §14940, C. L. 1897 (11742).

23. C. L. 1915 (8807), How. 2nd Ed. §7343, C. L. 1897 (6706).

24. C. L. 1915 (9625)-(9610)-(9573)-(9595), How. 2nd Ed. §§7968, 7953, 7908, 7929, C. L. 1897 (7326)-(7311)-(7377)-(7296).

25. C. L. 1915 (8876), How. 2nd Ed. §7413, C. L. 1897 (6776).

26. C. L. 1915 (9032), How. 2nd Ed. §9547. Act 232 of 1903, §16. See Act 106 of 1913; C. L. 1915 (11920)-(11944).

Part II—Annotated Statutes.

LIENS OF MECHANICS AND OTHERS.

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§ 103. Sec. 1. Lien for Labor and Materials.

(Who may claim lien.) Every person who shall, in pursuance of any contract, express or implied, written or unwritten, existing between himself as contractor, and the owner, part owner or lessee of any interest in real estate, build, alter, improve, repair, erect, ornament or put in, or who shall furnish any labor or materials in or for building, altering, improving, repairing, erecting, ornamenting or putting in any house, building, machinery, wharf, or structure or who shall excavate, or build in whole, or in part, any foundation, cellar or basement for any such house, building, structure or wharf, or shall build or repair any sidewalks or who shall furnish any materials therefor, and every person who shall be subcontractor, laborer, or material man, perform any labor or furnish materials to such original or principal contractor, or any subcontractor, in carrying forward or completing any such contract, shall have a lien therefor.

(Property to which lien extends.) Upon such house, building, machinery, wharf, walk or walks, foundation, cellar or basment, and other structures, and its appurtenances, and also upon the entire interest of such owner, part owner or lessee in and to the lot or piece of land, not exceeding one quarter section of land, or if in any incorporated city or village, not exceeding the lot or lots upon or around or in front of, which such improvement is made, to the extent of the right, title and interest of such owner, part owner or lessee at the time work was commenced or materials were begun to be furnished by the contractor under the original contract, or by the subcontractor who furnishes or is furnished with any labor or material in the performance or execution of such subcontract, and also the extent of any subsequently acquired interest of any such owner, part owner or lessee, and in case of the construction of a number of buildings, foundations, cellars, basements, or walks under one contract upon, around or in front of the same lot or contiguous lots for the same owner, part owner or lessee, of any

interest in the real estate upon which said buildings are situated or upon, around or in front of which said walk or walks are built or repaired, such lien for such material or labor so furnished, shall attach to all of said buildings, foundations, cellars, basements, walk or walks, together with the land upon, around or in front of, which the same are being constructed, the same as hereinbefore provided in case of a single building, foundation, cellar, basement, walk or improvement.

(Notice by subcontractor, laborer or materialman.) *Provided,* That any person, firm or corporation furnishing materials or performing labor of any kind entering into the construction of any such building, structure, foundation, cellar, basement or walk, shall within thirty days after furnishing the first of such material or performing the first of such labor to any contractor or subcontractor, serve on the owner, part owner or lessee of the premises, or his agent a notice, which notice shall be such as will inform the owner, part owner or lessee of the premises, or his agent, of the nature of the materials furnished, or labor performed, or to be performed, and a description of the premises where furnished, if such owner, part owner or lessee reside in or has a known agent in the county in charge of such structure, improvement, foundations, cellars, basements, walk or walks.

Such notice may be in the following form:

To ——, take notice that the undersigned is furnishing —— to ——— certain labor or materials for building, excavating or altering, improving, repairing, erecting or ornamenting, as the case may be, a certain —— situated on or around or in front of the following described property ——.

Such notice, however, shall be sufficient if served at any time subsequent to said thirty days, but before the original contractor shall make out and give to the owner, part owner or lessee or his agent, a statement under oath of the number and names of every subcontractor or laborer in his employ, and of every person, firm or corporation furnishing materials, giving the amount, if anything, which is due or to

become due on them, or any of them, for work done or materials furnished as required by section four of this act.

(Extent of owner's liability.) The owner, part owner or lessee shall not be liable to the subcontractor, materialmen or laborers, for any greater amount than he contracted to pay the original contractor, and shall be entitled to recoup any damages which he may sustain by reason of any failure or omission in the performance of such contract.

(Effect of payments made, but not distributed.) But the risk of all payments made to original contractor after he shall have received the notice above mentioned, or before the contractor shall have furnished him with a statement as hereinbefore provided, shall be upon the owner, part owner or lessee until the expiration of sixty days, within which claims for lien may be filed as hereinafter provided, and no payment made to any contractor before the expiration of said sixty days shall defeat any lien of any subcontractor, materialman or laborer, unless such payment has been distributed among the subcontractors, materialmen or laborers, or if distributed in part only, then to the extent of such distributions.

The title of the lien law is: "An act to establish, protect and enforce by lien the rights of mechanics and other persons furnishing labor or materials for the building, altering, improving, repairing, erecting or ornamenting of buildings, machinery, wharves and all other structures and the building and repairing [of] sidewalks, and to repeal all acts contravening the provisions of this act." (As amended by Act 17 of 1903).

§1, as amended by Act 199 of 1893, Act 143 of 1897, Act 17 of 1903, and Act 121 of 1909, C. L. 1915 (14796), How. 2nd Ed. §13766, C. L. 1897 (10710).

The lien reaches the actual interest in the property of the person contracting for the structure only. Wagar v. Briscoe, 38 Mich. 587 (594-596); Scales v. Griffin, 2 Doug. 54; Merrill v. Brant, 175 Mich. 182 (184-185), 141 N. W. 550. The interest at the time of the furnishing and that subsequently acquired is by statute subject to lien. Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578 (579), 132 N. W. 117. An unrecorded lease fixing the terms of lessee's interest and giving lessor a lien was held not subject to lien for improvements under contract with lessee. Peninsular General Electric Co. v. Norris, 100 Mich. 497, 59 N. W. 151. The interest of a lessee for decorations and fixtures permanently added to the property under his contract was reached. Albert Gall Co. v. Dowagiac Gas Co., 160 Mich. 255, 125 N. W. 283. Material furnished for a building, but not actually used therein do not form the basis for a lien, as the equity of lien claim arises

from increasing the value of the property. Smalley v. Gearing, 121 Mich. 191 (202-3), 79 N. W. 1114, 80 N. W. 797; North v. Globe Fence Co., 144 Mich. 557 (558), 108 N. W. 285. Materials sold to dealer in regular course of trade, with out knowledge that they are to be used in any particular building, but which were in fact ordered by dealer under contract with owner and used in the building, do not entitle seller to lien. VanCleve Glass Co. v. Erratt, 110 Mich. 689, 68 N. W. 978. The contract must relate to and be performed upon the land. Stout v. Sawyer, 37 Mich. 313 (315-316); People v. McAllister, 49 Mich. 12, 12 N. W. 891. Liens of subcontractors, laborers and materialmen are not prevented by contract of original contractor for erection which provides the building shall be delivered free from liens. Smalley v. Gearing, 121 Mich. 190 (198), 79 N. W. 1114, 80 N. W. 797. The right to lien was held complete where furnisher of materials had furnished practically all and was ready to supply the remainder when he should receive the dimensions. Frohlich v. Carroll, 127 Mich. 562 (565), 86 N. W. 1034. The contract provided there should be no charge for extras unless agreed to in writing; this held in a case of dispute on whether the things so charged were in fact extras, to preclude inclusion in lien of extras furnished by contractor on verbal demand. Gier v. Daiber, 148 Mich. 190, (194-195), 111 N. W. 773. A subcontractor is estopped to assert lien as to payments made by owner to contractor on subcontractor's request. Fairbairn v. Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469. A contractor cannot retain possession of the building to enforce payment of the contract price after time for performance has expired and he has ceased work, claiming that the building is completed according to contract, but if he attempts to do so may be proceeded against in trespass. Beller v. Stange, 27 Mich. 312. Wife's land not subject to lien for building thereon for her husband where she was not a party to contract and had no notice that materials were being furnished, but was served with the claim of lien and made defendant. Hall v. Erkfitz, 125 Mich. 332 (335), 84 N. W. 310. Where the husband in his own name contracted for the erection of house on his wife's land, the circumstances indicated that he was acting as her agent and the premises were held liable to lien. Frohlich v. Carroll, 127 Mich. 561, (564-565), 86 N. W. 1034. Where a contract price was less than cost to contractor, subcontractor, materialman or laborer entitled to lien for only his prorata share of contract price. Blitz v. Fields, 118 Mich. 85, 76 N. W. 119. Liens do not attach to public buildings, in absence of special provision. Knapp v. Swaney, 56 Mich. 345, 23 N. W. 162; Ford v. State Board of Education, 166 Mich. 658, 132 N. W. 467, C. L. 1915 (14827)-(14830), C. L. 1897 (10743)-(10745). Nor to property of electric railways for machinery furnished. Detroit Trust Co. v. Detroit, Flint & Saginaw, 159 Mich. 442 (453), 124 N. W. 45.

Lien held not prevented by a contingent liability of contractor to owner. Vaughan v. Ford, 162 Mich. 37 (43, 44), 127 N. W. 280.

It does not necessarily follow that because a city block is divided into lots, a lien may not attach to more of the lots than covered by the structure erected. But where platted lots other than those upon which a brick plant was located were so situated that deposits of material for manufacture into bricks might be taken therefrom, no lien attached by mere reason of that fact, to the

lots other than those upon which the building was situated. Adams v. Central City Granite, etc. Co., 154 Mich. 448 (454-457), 117 N. W. 932.

The service of this statutory notice (p. 163) is designed to protect subcontractor, laborer, or materialman in case contractor's statement does not embody his claim. Smalley v. Ashland Brown-Stone Co., 114 Mich. 104 (108), 72 N. W. 29. Subcontractor's failure to serve statement on owner does not relieve owner from liability where he paid contractor in full without requiring sworn statement provided for by section 4 (C. L. 1915 §14799). Blitz v. Fields, 115 Mich. 675, 74 N. W. 186; Smalley v. Ashland Brown-Stone Co., 114 Mich. 104 (108), 72 N. W. 29; Green Bay Cut Stone Co. v. Fabry, 169 Mich. 544 (549), 135 N. W. 312. For form of this notice of furnishing, see Form No. 1 in Part II.

Owner not liable to lien claimants for greater amount than he contracted to pay original contractor and may set off damages for delay. Smalley v. Gearing, 121 Mich. 190 (197, 202, 205), 79 N. W. 1114, 80 N. W. 797; Wells v. Board of Education, 78 Mich. 270, 44 N. W. 267. After acceptance of building by owner as complying with contract, he cannot recoup against materialman for defects in construction. Hannah & Lay Co. v. Hartzell, 125 Mich. 177 (181), 84 N. W. 52. But mere taking possession cannot of itself be treated as unequivocal acceptance of performance. Gier v. Daiber, 148 Mich. 190 (193), 111 N. W. 773, Frohlich v. Klein, 160 Mich. 142, 125 N. W. 14. Where the contractor delayed performance and refused to proceed upon notice and the owner received bids and contracted with the lowest bidder for completion, in a proceeding by subcontractors to enforce a lien, held, the owner was entitled to offset against the original contractor or subcontractor the actual cost of completion, including sums necessarily paid for new plans. Yeomans v. Parker, 105 Mich. 323, 63 N. W. 316. It cannot be said that a particular course of construction is approved by owner because permitted by him without interference. Boots v. Steinberg, 100 Mich. 134 (137), 58 N. W. 657.

No lien is permitted where the contract was not performed according to its terms. Frohlich v. Klein, 160 Mich. 142, 125 N. W. 14; Evans v. Woodley, 173 Mich. 20, 138 N. W. 275. Abandonment by contractor does not preclude liens of subcontractors and others to an aggregate which does not make the total cost exceed the contract price. Zilz v. Wilcox, 190 Mich. 486, 23 D. L. N. 24 (25), 157 N. W. 77; Delray Lumber Co. v. Keohane, 132 Mich. 17 (22), 92 N. W. 489.

The lien is direct in behalf of persons entitled and not by subrogation and claimant is not bound by stipulation as to acquisition of or waiving right to, lien in original contract to which he is not a party, except as to the contract price. Vaughan v. Ford, 162 Mich. 37 (45), 127 N. W. 280; Smalley v. Gearing, 121 Mich. 198, 79 N. W. 1114, 80 N. W. 797.

Payments by owner without requiring from contractor statement under section 4 are at owner's risk and his property is not relieved from lien because he believed that money previously advanced to materialmen on contractor's order paid them in full. Munroe v. Merrell, 113 Mich. 491, 71 N. W. 850. The owner is only entitled to protection as against persons unpaid, for such payments made without sworn statement as are distributed pro rata among all those entitled to participate. Fairbarn v. Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469. See Vaughan v. Ford, 162 Mich. 37 (46), 127 N. W. 280. Though

payments by owner are founded on contractor's sworn statement, under section 4 (C. L. 1915 §14799), they must be distributed pro rata, among all claimants of whom he has notice, to protect against lien. Frohlich v. Carroll, 127 Mich. 562, 86 N. W. 1034. Payments without sworn statement, under section 4 (C. L. 1915 §14799), not distributed pro rata cannot be allowed in owner's favor as against materialman's lien. Greilick Co. v. Rogers, 144 Mich. 314 (317), 107 N. W. 885; Hannah & Lay Co. v. Hartzell, 125 Mich. 177 (180), 84 N. W. 52. The owner is relieved from liability to the extent to which his payments have been distributed among subcontractors, materialmen or laborers, though the money they received is not the identical money paid by owner to contractor. Where contractor furnishes materials, their value is to be included in determining amount distributed. Pro rata distribution among all claimants (of the same degree) is contemplated and owner is not entitled to credit for amount received by a claimant in excess of his proportionate share. Smalley v. Gearing, 121 Mich. 191 (199, 200, 201), 79 N. W. 1114, 80 N. W. 797. In determining cost of structure, in order to ascertain for what proportion of their claims claimants are entitled to liens, payments made without requiring statement from contractor, which went to pay for materials or labor actually going into the structure, are to be included. All lienor can claim is that the contract price (less any required deductions) be apportioned among those entitled and where cost of completed structure exceeds the contract price, a claimant is entitled to such proportion of his claim as the contract price bears to cost of completed structure. Godfrey Lumber Co. v. Cole, 151 Mich. 280, 114 N. W. 1018; Frohlish v. Ashton, 159 Mich. 265, 123 N. W. 1130. Balance remaining after allowing owner for payments properly distributed or made and damages or deductions to which he may be entitled, if insufficient to pay claims in full, will be distributed among the claimants and unpaid claims, pro rata in proportion to the valid liens and other claims. Frohlich v. Ashton, 164 Mich. 132, (134), 129 N. W. 18; modifying same case in 159 Mich. 265, 123 N. W. 1130; Blitz v. Fields, 118 Mich. 85, 76 N. W. 118; Smalley v. Gearing, 121 Mich. 191, 79 N. W. 1114, 80 N. W. 797; Godfrey Lumber Co. v. Cole, 151 Mich. 280, 114 N. W. 1018; Kotcher v. Perrin, 149 Mich. 690, 113 N. W. 284. After the owner made payments to contractor without requiring statement under section 4 [C. L. 1915 (14799)], contractor abandoned his contract and owner completed the building. Held, the amounts paid by contractor to laborers and materialmen together with outstanding liens and cost of completion divided into the contract price, gives the per cent of his claim which each lienor is entitled to recover. Kotcher v. Perrin, 149 Mich. 690, 113 N. W. 284. Materialman receiving payments from contractor, while materials being furnished, who did not direct their application, had the right to apply them on charges other than those for materials entering into the building in question. Union Trust Co. v. Casserly, 127 Mich. 183, 86 N. W. 545; Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 23 D. L. N. 73, (76), 157 N. W. 96; People v. Grant, 139 Mich. 26, 102 N. W. 226.

§ 104. Sec. 2. Lien on Property of Husband and Wife.

(Homesteads and estates by entirety.) In case the title to such lands upon which improvements are made is held by husband and wife jointly, or in case the lands upon which such improvements are made are held and occupied as a homestead, the lien given by this act shall attach to such lands and improvements if the improvements be made in pursuance of a contract in writing signed by both the husband and wife.

§2, as amended by Act 143 of 1897, C. L. 1915 (14797), How. 2nd Ed. §13767, C. L. 1897 (10711).

Mechanics' lien cannot be created against land held or being purchased to be held, in entirety by husband and wife, except under contract signed by both, nor has husband any interest therein during his lifetime to which lien can attach. Bauer v. Long, 147 Mich. 351, 110 N. W. 1059; McMillan v. Schneider, 147 Mich. 264, 110 N. W. 961; Restrick Lumber Co. v. Wyrembolski, 164 Mich. 71, 128 N. W. 1083; Sheldon, Kamm & Co., v. Bremer, 166 Mich. 578 (582), 132 N. W. 117; Burman v. Ewald, 192 Mich. 293 23 D. L. N. 449, 158 N. W. 853. The rule applies equally where the land is held by husband and wife under executory contract to purchase, and in the absence of wife's signature no lien attaches either to lot or structure. Frohlich v. Blackstock, 155 Mich. 604, 119 N. W. 906.

The constitution and statute prohibit lien attaching to homestead, unless arising under written contract signed by both husband and wife. Jossman v. Rice, 121 Mich. 270 (274-277), 80 N. W. 25; Burtch v. McGibbon, 98 Mich. 139, 56 N. W. 1110; John Wallace Sons Co. v. Wilkinson, 181 Mich. 693 (699), 148 N. W. 166; Holland Furnace Co. v. Hartig, 181 Mich. 342 (346), 148 N. W. 169. The contract though in writing, must show intent to include the homestead interest to subject it to lien. Burtch v. McGibbon, 98 Mich. 139, 56 N. W. 1110; Hammond v. Wells, 45 Mich. 11, 7 N. W. 218. A homestead exemption may be claimed in land purchased for and upon which a homestead is to be constructed. Lamont v. LeFevre, 96 Mich. 175 (178), 55 N. W. 687; Deville v. Widoe, 64 Mich. 593 (594-595), 31 N. W. 533; Mills v. Hobbs, 76 Mich. 122 (125-126), 42 N. W. 1084, A contract for house to be used as homestead when completed must be signed by wife to give basis for lien upon the land, though title in third person, though under section 3 lien may attach to house separately and be enforced by its sale and removal. Holliday v. Mathewson, 146 Mich. 336, 109 N. W. 669. The homestead right is limited to premises actually occupied, where several dwellings are erected on one lot. Frohlich v. Carroll, 127 Mich. 562, 86 N. W. 1034. A homestead can be claimed if premises used partly for business purposes and partly as a dwelling. King v. Welborn, 83 Mich. 195 (197), 47 N. W. 106; Lamont v. LeFevre, 96 Mich. 175 (178), 55 N. W. 687. The excess over $1,500 may in certain cases be subject to lien, though wife does not sign contract. McAllister v. DesRochers, 132 Mich. 382 (383-385), 93 N. W. 887; Scott v.

Keeth, 152 Mich. 547 (551-552), 116 N. W. 183; Lamont v. LeFevre, 96 Mich. 175 (176, 178), 55 N. W. 687. See, however, Holland Furnace Co. v. Hartig, 181 Mich. 342 (346-347), 148 N. W. 169. To reach the excess value of a homestead over $1,500, where it is subject to lien, the premises may be sold. Lamont v. LeFevre, 96 Mich. 175 (178), 55 N. W. 687; McAllister v. DesRochers, 132 Mich. 381 (384), 93 N. W. 887. The ownership and occupancy of another house as a homestead held to preclude claim of homestead in house being constructed so as to defeat liens where wife did not sign. McMonegal v. Wilson, 103 Mich. 265 (267-268), 61 N. W. 495; Delray Lumber Co. v. Keohane, 132 Mich. 17 (19), 92 N. W. 489.

§ 105. Sec 3. Lien on Building.

(Liens where title not in contractee). Any person furnishing services or materials for the erection of a new building or structure upon land to which the person contracting for such erection has no legal title, shall have a lien therefore upon such building (buildings) or structure; and the forfeiture or surrender of any title or claim of title held by such contracting person to such land shall not defeat the lien upon such building or structure of such person furnishing services or materials as aforesaid.

(Liens on property held under land contract.) In case the property covered by the lien is held by the vendee in a land contract, and he surrenders or forfeits his rights thereunder, the person or persons holding such liens may be subrogated to the rights of such vendee, as his rights existed immediately before such surrender or forfeiture, by performing the covenants contained in such contract within thirty days after such forfeiture or surrender is made.

§3, C. L. 1915 (14798), How. 2nd Ed. §13768, C. L. 1897 (10712).

This section does not apply and subject to lien a building erected upon land of the owner and wife as tenants in entirety, without a contract duly executed. Bauer v. Long, 147 Mich. 351, 110 N. W. 1059; Sheldon, Kamm & Co., v. Bremer, 166 Mich. 578, 132 N. W. 117. This section subjects the house, on land subject to homestead claim where claimants of homestead have not the legal title, to lien, where wife does not sign contract and lien may be enforced by sale and removal of the house. Holliday v. Mathewson, 146 Mich. 336, 109 N. W. 669. But not so where the land is held by husband and wife under executory contract to purchase as tenants by entireties later converted into deed, and contract is signed only by husband. Frohlich v. Blackstock, 155

Mich. 604, 119 N. W. 906; John Wallace Sons Co. v. Wilkinson, 181 Mich. 694 (699), 148 N. W. 166. Where tenants by entireties executed a deed and took a land contract, the transaction amounting to a mortgage, it was held that they did not divest themselves of title so as to permit the acquiring of lien against the building in a case where the wife did not sign, under the theory of erection of a new structure on land to which the person contracting had no legal title. Restrick Lumber Co. v. Wyrembolski, 164 Mich. 71, 128 N. W. 1083.

§ 106. Sec. 4. Owner May Retain Money.

(Right of owner to retain sums due contractor.) The owner, part owner or lessee may at any time retain from any moneys due or to become due to the original contractor, an amount sufficient to pay all demands owing or unpaid to any subcontractor, materialman or laborer, who has filed and served the notice in manner and form as provided in section one of this act.

(Statement by contractor.) The original contractor shall, whenever any payment of money shall become due from the owner, part owner or lessee, or whenever he desires to draw any money from the owner, part owner or lessee on such contract, make out and give to the owner, part owner or lessee, or his agent, a statement under oath of the number and names of every subcontractor or laborer in his employ, and of every person furnishing materials, giving the amount, if anything, which is due or to become due to them or any of them for work done or materials furnished, and

(Right of owner to retain sums due contractor.) The owner, part owner or lessee, or his agent, may retain out of any money then due or to become due to the contractor, an amount sufficient to pay all demands that are due or to become due to such subcontractors, laborers and materialmen, as shown by the contractor's statement, and pay the same to them according to their respective rights, and all payments so made shall, as between such owner, part owner or lessee, and such contractor, be considered the same as if paid to such original contractor.

(Contractor's right to lien or action before making statement.) Until the statement provided for in this section is made, in manner and form as herein provided, the contractor shall have no right of action or lien against the owner, part owner or lessee on account of such contract, and any payments made by the owner, part owner or lessee, before such statement is made, or without retaining sufficient money, if that amount be due or is to become due, to pay the subcontractors, laborers or materialmen, as shown by the statement, shall be considered illegal and made in violation of the rights of the persons intended to be benefited by this act, and the rights of such subcontractors, laborers and materialmen to a lien shall not be affected thereby. If neither such owner, part owner, lessee nor his agent can be found within the county, then it shall not be necessary for the contractor to make and deliver such statement as a prerequisite to the institution of proceedings under this act or other suit or proceeding.

(Right of owner to require statement.) In order that the owner, part owner, or lessee may be protected, he may at any time during the progress of the work demand in writing of the contractor the statement herein provided for, which shall be made by the contractor and given to the owner, part owner or lessee, or his agent, and if such contractor fail to furnish such statement within five days after demand made, he shall be liable to such owner, part owner, or lessee, each time he so refuses or neglects to comply with such demand, in the sum of one hundred dollars, and also for all actual damages occasioned by such neglect or refusal, to be recovered in an action on the case or in any other appropriate proceeding.

§4, C. L. 1915 (14799), How. 2nd Ed. §13769, C. L. 1897 (10713).

Service by person, directed by contractor's attorney to make it, is sufficient. Cady v. Fair Plain Ass'n, 135 Mich. 295, 97 N. W. 680. The furnishing of this sworn statement by contractor is a necessary prerequisite to suit to enforce the lien, or upon the contract. Sterner v. Haas, 108 Mich. 488, 66 N. W. 348: Wiltsie v. Harvey, 114 Mich. 131, 72 N. W. 134; Martin v. Warren, 109 Mich. 584, 67 N. W. 897; Barnard v. McLeod, 114 Mich. 73, 72 N. W. 24; Wildey v. Gillett, 171 Mich. 157, 136 N. W.

1116. For form, see Form No. 2 in Part III. Statement as prerequisite to suit not required of manufacturers selling materials made in their own shops, as they are materialmen. Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111, 82 N. W. 801. Requirement of sworn statement not dispensed with by the fact that 60 days from full completion of work have expired when bill filed. Martin v. Warren, 109 Mich. 584, 67 N. W. 897. Nor because all material and labor paid for and such statement has never been requested by owner. Sterner v. Haas, 108 Mich. 488, 66 N. W. 348. Nor because the owner and the contractor are the only parties interested. Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111, 82 N. W. 801.

Failure to serve the statement not fatal to maintenance of action where it appeared that objection was not raised on trial in Justice Court, that statement was never demanded, and all bills have been paid. Bollin v. Hooper, 127 Mich. 287, 86 N. W. 795. Nor in assumpsit where time to obtain liens has long since passed, and it appears that no laborers, materialmen, etc., are in position to assert lien or subject the owner to litigation. Walker v. Syms, 118 Mich. 183, 76 N. W. 320; nor where time to assert lien has expired; Morton v. Eaton, 141 Mich. 444, 104 N. W. 726.

Owner not relieved from liability to subcontractor where he pays contractor full contract price without requiring this sworn statement, even though subcontractor did not give notice under §1, [C. L. 1915, (14796)] Blitz v. Fields, 115 Mich. 675, 74 N. W. 186. And payments so made and not distributed pro rata cannot be allowed as against the lien of a material man or laborer. Greilick Co. v. Rogers, 144 Mich. 314, 107 N. W. 885; Hannah & Lay Co. v. Hartzell, 125 Mich. 177, 84 N. W. 52; Zilz v. Wilcox, 190 Mich. 486, 23 D. L. N. 24 (27), 157 N. W. 77. And the fact that owner believed, when making payments, that moneys previously advanced by him to material men, on contractor's order, had paid his claims in full, will not relieve property from lien for balance due, where no misrepresentation by claimants. Munroe v. Merrell, 113 Mich. 491, 71 N. W. 850. Where owner paid contractor in full without requiring sworn statement, he is not relieved from liability by subcontractor's failure to serve statement under section 1, [C. L. 1915, (14796)]. Smalley v. Ashland, Brown-Stone Co., 114 Mich. 104, 72 N. W. 29. Payments by owner founded on contractor's sworn statement, must be distributed pro rata among all claimants of whom owner has notice to protect against lien. Frohlich v. Carroll, 127 Mich. 562, (566-567), 86 N. W. 1034. Owner cannot waive service of statement so as to give contractor as lienor right to share with other lienors, or take precedence over subsequent mortgage. Adams v. Central City Granite, etc. Co., 154 Mich. 448, 117 N. W. 932. Sub-contractor estopped to assert lien as to payments made by owner to contractors at subcontractor's request. Fairbairn v. Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469.

§ 107. Sec. 5. Filing of Statement.

(Method of claiming lien.) Every person, or his agent or attorney, whether contractor, subcontractor, materialman or laborer, who wishes to avail himself of the provisions

of this statute, shall make and file in the office of the register of deeds, in the county or counties in which said real estate, house, building, structure or improvement to be charged with the lien is situated, a just and true statement or account of the demand due him, over and above all legal setoffs, setting forth the time when such materials were furnished or labor performed, and for whom, and containing a correct description of the property to be charged with the lien, and the name of the owner, part owner or lessee, if known, which statement shall be verified by affidavit. Such verified statement or account shall be filed within sixty days from the date on which the last of the materials shall have been furnished or the last of the labor shall have been performed by the person claiming the lien, which statement may be in the following form:

STATE OF MICHIGAN, } ss.
COUNTY OF ——. }

A B, of ——, being duly sworn, says, that he furnished certain labor (or materials) in and for building (or altering, improving, repairing, erecting or ornamenting, as the case may be), a certain ——, situated on the land hereinafter described, in pursuance of a certain contract with C D, the owner (or part owner or lessee, contractor, subcontractor or other person, as the case may be). The performance of such labor (or the furnishing of such materials, or both) was begun on the —— day of —— 19—, and the last of such labor was performed (or such materials furnished, or both) on the —— day of —— 19—; and there is justly and truly due deponent therefor from the said C D, over and above all legal set-offs, the sum of —— dollars, for which amount deponent claims a lien on said land (or building) of which —— is the owner (or part owner, or lessee as the case may be), which premises are described as follows ——.

A ———— B ————.

Subscribed and sworn to before me this ——— day of ——— 19—.

———————————————,

Notary Public for ——— County.

My commission expires ——— day of ———, 19—.

(Duty of register of deeds.) The register of deeds shall indorse upon every statement or account, the date of its filing, and make an abstract thereof in a book to be kept by him for that purpose, and properly indexed, containing the date of its filing, the name of the person claiming the lien, the amount of the lien, the name of the person against whom the lien is filed, and a description of the property to be charged with the same, and

(Effect of filing claim.) Such filing shall have the same effect as to notice as against subsequent purchasers or incumbrancers as the recording of a mortgage.

(Fees.) The register of deeds shall receive the sum of seventy-five cents as his fees for the filing of such statement or account, and all subsequent papers filed with him relating to such lien.

§5, C. L. 1915 (14800), How. 2nd Ed. §13770, C. L. 1897 (10714).

Lien not invalidated by lapse of a day between date of affidavit and time of filing claim of lien. Fairbairn v. Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469. Lien may be asserted by person whose claim not yet due. §26 of Act 179 of 1891, C. L. 1915 (14821), How. 2nd Ed. §13791, C. L. 1897 (10735).

"Due" is synonymous with the word "owing" and claim for debt evidenced by notes not due would create lien. Smalley v. Ashland Brown-Stone Co., 114 Mich. 104, 72 N. W. 29.

Materials sold to contractor for use in a building but not actually used therein, cannot furnish the basis for lien against it. Smalley v. Gearing, 121 Mich. 191, 79 N. W. 1114, 80 N. W. 797. An unintentional claiming of an excessive amount through honest mistake will not invalidate a lien. Scheibner v. Cohnen, 108 Mich. 165, 65 N. W. 760; McAllister v. DesRochers, 132 Mich. 381, 93 N. W. 887; McMonegal v. Wilson, 103 Mich. 264, 61 N. W. 495; Union Trust Co. v. Casserly, 127 Mich. 184, 86 N. W. 545; Fairbairn v. Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469; Hulburt v. Just, 126 Mich. 337, 85 N. W. 872; Frohlich v. Carroll, 127 Mich. 561, 86 N. W. 1034; Frohlich v. Ashton, 159 Mich. 265, 123 N. W. 1130 Vaughan v. Ford, 162 Mich. 37 (45), 127 N. W. 280; Perkins v. The Golden Girl, 185 Mich. 200, 151 N. W. 660; Halpin v. Garman, 192 Mich. 71, 23 D. L. N. 421, 158 N. W. 29; Grace Harbor Lumber Co. v Ortman,

190 Mich. 429, 23 D. L. N. 73 (78), 157 N. W. 96; Gibbs v. Hanchette, 90 Mich. 657 (661), 51 N. W. 691. An intentional claiming of a larger amount than due invalidates the lien. Gibbs v. Hanchette, 90 Mich. 657, 51 N. W. 691; Griff v. Clark, 155 Mich. 611, 119 N. W. 1076. As will also the inclusion of speculative items. Brennan v. Miller, 97 Mich. 182, 56 N. W. 354. And no lien is acquired where a material man furnishes materials for several jobs simultaneously, making no application of money paid by contractor to any specific house until the contractor becomes unable to pay, when he arbitrarily fixes an amount for a certain house as a proper share of contractor's debt attributable thereto, which is in fact 25% too large. Greilick Co. v. Taylor, 143 Mich. 704, 107 N. W. 712. Where it appeared that the material man changed his accounts and altered the credits of payments which he had made on the contractor's account after the contractor had absconded, so as to increase the amount for which he could claim lien against contractee, it was held that his action was an attempted fraud, which destroyed the lien. Hannah & Lay Co. v. Mosser, 105 Mich. 19, 62 N. W. 1120. The contract provided there should be no charge for extras unless agreed to in writing; this held to preclude inclusion in lien of extras, denied to be such, and furnished on verbal demand. Gier v. Daiber, 148 Mich. 190, 111 N. W. 773. Material man's right to lien complete when his contract to furnish is completed, except as to certain minor details, which he was ready to supply as soon as he should receive dimensions. Frohlich v. Carroll, 127 Mich. 562, 86 N. W. 1034. That complainant's book account against contractor contained other charges than those relating to the building in question is not of itself sufficient to show a waiver of his right to lien. Union Trust Co. v. Casserly, 127 Mich. 183, 86 N. W. 545.

Misstatement of date of furnishing first and last materials not fatal where the claim of lien was filed within 60 days from the furnishing of last material. Union Trust Co. v. Casserly, 127 Mich. 183, 86 N. W. 545.

The description will be sufficient, so far at least as the owner is concerned, if it identifies the land upon which the building is situated. Hannah & Lay Co. v. Hartzell, 125 Mich. 177, 84 N. W. 52; Jossman v. Rice, 121 Mich. 270, 80 N. W. 25; Hicks v. Finbarg, 189 Mich. 332, 22 D. L. N. 966, 155 N. W. 359. Where the land is imperfectly described, but the building is accurately described, the lien will perhaps stand against the building alone. Hannah & Lay Co. v. Mosser, 105 Mich. 19, 62 N. W. 1120.

The name of the owner of the premises must be stated, if known. If not known, that fact must appear. A misstatement of the owner's name is fatal, unless claimant's ignorance of the owner's true name is chargeable to the owner himself. Waters v. Johnson, 134 Mich. 436, 96 N. W. 504; John F. Noud Co. v. Stedman, 193 Mich. 459, 160 N. W. 547. Mistaking the name of the contractor in the claim of lien is fatal. Lacy v. Piatt Power, Etc. Co., 157 Mich. 544, 122 N. W. 112.

Use of initial of christian name of owner held sufficient where no question of identity raised; Hicks v. Finbarg, 189 Mich. 332, 22 D. L. N. 966, 155 N. W. 359.

The claim of lien should not be sworn to by the party interested before the attorney who is to enforce it. Claim held not defective because sworn to before attorney preparing it. Zilz v. Wilcox, 190 Mich. 486, 23 D. L. N. 24 (26), 157 N. W. 77.

One partner cannot swear another, where the firm is interested.

Smalley v. Bodinus, 120 Mich. 363, 79 N. W. 567. Claim of lien verified by one partner, stating existence of partnership, giving names of members, stating that affidavit is made in their behalf, properly shows authority to make and verify claim of lien. Yeomans v. Parker, 105 Mich. 323, 63 N. W. 316.

Complainant furnished material upon estimate made by him and afterwards delivered further material from time to time as ordered. Held, that all material was furnished on single contract and the 60 days limited by statute began to run upon last delivery. Union Trust Co. v. Casserly, 127 Mich. 183, 86 N. W. 545; Smalley v. Gearing, 121 Mich. 191, 79 N. W. 1114, 80 N. W. 797. Right to lien arises from delivery to owner, not to contractor, hence 60 days for filing liens dates from delivery at building, not from delivery to contractor. North v. Globe Fence Co., 144 Mich. 557, 108 N. W. 285; Smalley v. Gearing, 121 Mich. 191, 79 N. W. 1114, 80 N. W. 797. Time of furnishing articles not ordered or used in building cannot extended time for filing lien for materials furnished. Battle Creek Lumber Co. v. Poland, 150 Mich. 690, 114 N. W. 671. The date of furnishing materials to the contractor in good faith for a building, but not in fact used in the building by him, nor delivered on the land, but sold to a third person cannot be regarded as the date of the last furnishing from which the time to file a mechanics' lien begins to run. North v. Globe Fence Co., 144 Mich. 557, 108 N. W. 285. Stating the last date of delivery is sufficient. John F. Noud Co. v. Stedman, 193 Mich. 459, 160 N. W. 547.

Matter unnecessarily included, in statement of claimant's lien, treated as surplusage, and does not invalidate liens. Waters v. Johnson, 134 Mich. 436, 96 N. W. 504; McMonegal v. Wilson, 103 Mich. 264, 61 N. W. 495. For forms of statements of lien by principal and agent or partner respectively, see Forms No. 3 and 4 in Part III.

§ 108. Sec. 6. Service of Copy on Owner.

(Service of claim of lien.) Every person filing such statement or account as provided in the preceding section, except those persons contracting or dealing directly with owner, part owner or lessee of such premises shall, within ten days after the filing thereof, serve on the owner, part owner or lessee of such premises, if he can be found within the county, or in case of his absence from the county, on his agent having in charge of such premises within the county wherein the property is situated, a copy of such statement or claim; but if neither of such persons can be found within the county where such premises are situated, then such copy shall be served by posting in some conspicuous place on said premises within five days after the same might have been served personally, could the principal or agent, as aforesaid, have been found.

(Proof of service.) Proof of such service and the date and manner thereof shall be made by the affidavit of such person serving or posting the same, which proof of such service shall be filed in the office of the register of deeds of such county before any subsequent proceedings shall be taken for the enforcement of such lien.

§6, of Act 179 of 1891 as amended by Act 199 of 1893, C. L. 1915 (14801), How. 2nd Ed. §13771, C. L. 1897 (10715).

Service must be upon the person owning the premises at the time claim of lien is filed. Waters v. Johnson, 134 Mich. 436, 96 N. W. 504. Service must be by the statutory method and service by mail or personal service outside the county, is insufficient. Hannah & Lay Co. v. Mosser, 105 Mich. 18, 62 N. W. 1120; Wiltsie v. Harvey, 114 Mich. 131, 72 N. W. 134. Personal service is imperative where possible; lien failed for defective service where notice served by posting though subcontractor claimant knew owner had a resident agent. Zilz v. Wilcox, 190 Mich 486, 23 D. L. N. 24 (25), 157 N. W. 77. The land owner may waive statutory service so far as his own rights are concerned. Mouat v. Fisher, 104 Mich. 262, 62 N. W. 338. Though the burden of proof of waiver is upon him who asserts it and the proof must be clear. Marquette Lumber Co. v. Albee, —— Mich. ——, 162 N. W. 1005. The claim of lien was served upon wife alone and she was made sole defendant in bill to enforce. Held, that building erected on her land under contract with husband not subject to lien for materials entering into construction. Hall v. Erkfitz, 125 Mich. 332, 84 N. W. 310. But where husband contracted in his own name on his wife's behalf for erection of buildings on her land pursuant to agreement between themselves to defeat liens thereby, the fact that claim of lien for materials furnished was served upon husband alone as owner of land, will not prevent lien. Frohlich v. Carroll, 127 Mich. 562, 86 N. W. 1034. Where the statement of lien is served within the time limited for filing, but not until after the statement is filed, the lien is not for that reason defective. Holliday v. Mathewson, 146 Mich. 336, 109 N. W. 669. And service of copy of claim of lien on the owner the day before filing is a substantial compliance with the statute. Fairbairn v. Moody, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469.

Service on the owner's wife, residing on the premises in his absence, has been held sufficient as being on the agent in charge. Greilick Co. v. Rogers, 144 Mich. 313, 107 N. W. 885. Though service upon an agent and bookkeeper in charge of the owner's office is insufficient. Wiltsie v. Harvey, 114 Mich. 131, 72 N. W. 134.

Filing proof of service with register of deeds before commencing proceedings to enforce lien has been held directory. Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141, 71 N. W. 466. For form, see Form No. 5 in Part III.

§ 109. Sec. 7. Discharge of Lien.

(Bond to discharge lien.) The lien of any contractor, subcontractor, materialman or laborer may, at any time, be

vacated and discharged if the owner, part owner or lessee or contractor, shall give to each of such persons whose liens are to be discharged, and file with the clerk of the circuit court for the county in which such property is situated, a good and sufficient bond in the penal sum of twice the amount for which the lien is claimed, with two or more sureties to be approved by the said clerk, conditioned for the payment of any sum for which the obligee in such bond may obtain judgment or decree upon the demand for which such statement of account was filed, which sureties shall justify their responsibility before such clerk or a circuit court commissioner, under oath, and shall severally testify that they are each worth in real estate in the county in which such property is situated, over and above all exemptions, incumbrances, debts and other liabilities, the penal sum of said bond, each of which justifications shall be endorsed in full on said bond, the said clerk on receiving such bond shall within ten days thereafter serve a notice upon all persons claiming a lien upon said premises of the fact of the filing of such bond, stating the amount thereof and the names of the sureties thereon. The said lien holders or claimants shall have ten days after the service upon them of the said notice within which to file objections to the sureties on said bond, and in case any such objections to the sufficiency of such sureties is filed with the said clerk within the ten days as aforesaid, the said clerk shall not approve the said bond until after the said sureties shall have appeared before him and answered under oath such questions as may be put to them by or on behalf of lien holder or claimant touching their financial responsibility. If no objections to the sufficiency of the sureties upon such bond shall have been filed within the said ten days, or if, after the examination of the sureties under oath as herein provided, the said county clerk shall approve said bonds, the said clerk shall at once give to the obligee named therein a certificate that a good and sufficient bond has been filed with him as required by law and shall state the names of the obligor and obligee, the

amount of the bond and description of the property covered by the lien thereby discharged. Upon the filing of said certificate in the office of said register of deeds, the lien of the obligee therein named, if of record, shall thereby be discharged.

§7, as amended by Act 143 of 1897, C. L. 1915 (14802), How. 2nd Ed. §13772, C. L. 1897 (10716).

The provision in this section, permitting the giving of bond, and discharging lien, is valid. McHugh v. Gault, 86 Mich. 135, 48 N. W. 869. For forms of bond and certificate respectively, see Forms No. 6 and 7 in Part III.

§ 110. Sec. 8. Statement of Material by Claimant.

(Statement by lienor.) Each person claiming a lien as aforesaid shall, from time to time, whenever required by such owner, part owner or lessee, or his agent, and within five days from demand thereof furnish such person demanding the same, a written statement of the amount of work and materials furnished to date of statement, and then unpaid, as nearly as can then be ascertained, under penalty of a forfeiture of his lien.

(Production of contract and furnishing statement by owner.) Such owner, part owner or lessee shall, within five days after demand of any person claiming lien as aforesaid, produce the contract existing between himself and the contractors, if in writing, and freely permit such lien claimant to make a copy thereof, and shall also, within five days after demand thereof, furnish such lien claimant a written statement of the amount due and unpaid on such contract. If such owner, part owner or lessee shall neglect or refuse to allow any lien claimant to make a copy of said contract, or shall neglect or refuse to make such written statement of the amount due and unpaid thereon, as aforesaid, he shall be liable to such lien claimant, his representatives or assigns, each time he so refuses or neglects to comply with such demand, in the sum of one hundred dollars, and also for all actual damages occasioned by such neglect or refusal, to be recovered in an action on the case or to be awarded by a

court of equity upon a bill filed to compel the production of such contract, or a disclosure of the amount due and unpaid thereon.

§8, C. L. 1915 (14803), How. 2nd Ed. §13773, C. L. 1897, (10717).

Though the owner is not prejudiced, failure by a lienor to furnish the owner a statement of his claim within five days after demand, forfeits the lien. Frohlich v. Beecher, 139 Mich. 278, 102 N. W. 736. But not so where the demand is not made until after bill is filed. Rohde v. Weinberg, 156 Mich. 318, 120 N. W. 789.

§ 111. Sec. 9. Time Lien Continues.

(Proceedings to enforce, when to be begun.) The several liens herein provided for shall continue for one year after such statement or account is filed in the office of the register of deeds, and no longer unless proceedings are begun to enforce the same as hereinafter provided, and such liens shall take priority as follows:

(Priorities.) First, As between persons claiming liens under this statute, the several liens upon the same property attaching by reason of work, labor or materials furnished in carrying forward or completing the same building or buildings, machinery, structure or improvement, shall be deemed simultaneous mortgages;

Second, They shall take priority to all garnishments for the contract debt made prior or subsequent to the commencement of the furnishing of the materials or performance of the labor without regard to the date of filing the claims for lien;

Third, They shall be preferred to all other titles, liens, or incumbrances which may attach to or upon such building, machinery, structure or improvement or to or upon the land upon which they are situated, which shall either be given or recorded subsequent to the commencement of said building or buildings, erection, structure or improvement;

Fourth, The liens for such labor or materials furnished, including those for additions, repairs, and betterments, shall attach to the buildings, machinery, erection, structure, or improvement for which they are furnished or done, subject

to any prior recorded title, claim, lien, incumbrance, or mortgage to or upon the land upon which such building or buildings, machinery, erection, structure or improvement belongs or is put. Any person holding a lien for such labor or materials furnished upon any premises subject to any prior recorded lien, incumbrance or mortgage may pay off any such prior lien, incumbrance or mortgage, and shall thereupon be subrogated to all the rights of the prior holder of such lien, incumbrance or mortgage.

§9, as amended by Acts 143 of 1897 and 199 of 1893, C. L. 1915 (14804), How. 2nd Ed. §13774, C. L. 1897 (10718).

The suit is instituted when the bill is filed. Sheridan v. Cameron, 65 Mich. 680, 32 N. W. 894; Casserly v. Wayne Circuit Judge, 124 Mich. 157, 82 N. W. 841. The time within which suit to enforce must be commenced is computed from the day of filing claim of lien with the register of deeds to the filing of the bill or cross bill under section 10 (C. L. 1915, §14805); Hannah & Lay Co. v. Mosser, 105 Mich. 18, 62 N. W. 1120. Where contractor filed bill to foreclose lien without giving owner sworn statement required by section 4, and made a prerequisite of his right to begin action, the proceeding was premature and the lien terminated at expiration of the statutory period. Dittmer v. Bath, 117 Mich. 571, 76 N. W. 89. After expiration of time for filing bill, answer in nature of cross bill may be amended to properly re-state the facts constituting the cause of action set up in the original answer. Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141, 71 N. W. 466. Where a necessary party defendant is added by amendment, only the new defendant can take advantage of the objection that he was not made a party within the year. Sheridan v. Cameron, 65 Mich. 680, 32 N. W. 894; Casserly v. Wayne Circuit Judge, 124 Mich. 157, 82 N. W. 841. In determining priorities, liens attach as of the date of the commencement of the building or improvement, regardless of the time when, or person by whom, particular work is done or materials furnished for which lien is claimed. Kay v. Towsley, 113 Mich. 283, 71 N. W. 490. Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111 (114), 82 N. W. 801. J. W. McCausey & Co. v. Gittleman, 201 Mich. 8, 166 W. 896. But see Sheldon, Kamm & Co. v. Bremer, 166 Mich. 578-579, 132 N. W. 117. The rights of a garnishing creditor of contractor cannot be postponed by consent of wife to entry of decree establishing lien where she did not sign contract for improving land owned by herself and husband jointly. McMillan v. Schneider, 147 Mich. 258, 110 N. W. 961. The lien takes precedence of a mortgage executed after commencement of the building, though the contract for furnishing the materials for which lien is claimed was not entered into until after the mortgage was executed and recorded. Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Power & Light Co., 124 Mich. 111, 82 N. W. 801. The attempt of owner to waive service of statement required of contractor under section 4 (C. L. 1915, §14799) as prerequisite to suit to enforce lien will not be effectual as against mortgagee or another lienor. Dittmer v. Bath, 117 Mich. 571, 76 N. W. 89; Wiltsie v.

Harvey, 114 Mich. 131, 72 N. W. 134. Vendor's lien or chattel mortgage preferred to lien. Presque Isle Sash & Door Co. v. Reichel, 179 Mich. 466 (474), 146 N. W. 231. Previous to amendment this section permitted a new building to be sold separately from the land, where the land was not subject to lien because of being a homestead, and the contract not having been signed by the wife. Jossman v. Rice, 121 Mich. 270, 80 N. W. 25.

§ 112. Sec. 10. Proceedings to Enforce Lien.

(Proceedings to enforce.) Proceedings to enforce such lien shall be by bill in chancery, under oath, and notice of lis pendens filed for record in the office of register of deeds shall have the effect to continue such lien pending such proceedings.

(Parties.) And in such proceedings, the complainant shall make all persons having rights in said property affected or to be affected by such liens so filed in the office of the register of deeds, and all persons holding like liens so filed, and those having filed notice of intention to claim a lien, parties to such action.

(Intervening defendants.) And all persons holding like liens or having filed notice of intention to claim a lien, or any other persons having rights in said property, may make themselves parties thereto on motion to the court, and notice to complainant, and may file their intervening or cross-bills or answers claiming the benefit of cross-bills and notices of lis pendens therein.

(When surety, etc., parties to action.) And whenever the principal contractor or any subcontractor shall have given to the owner, or other person or persons having rights in said property, any bond or surety or guaranty of any kind to protect such owner or other person or persons having rights in said property, against the liens provided for by this act, then the complainant or the owner or other person or persons having rights in said property, may make the surety or sureties in such bond or guaranty, parties to such action by such original bill or by cross-bills or answers claiming the benefit of a cross-bill, and the court shall thereupon settle and determine the

rights and liabilities of all the parties in the matter, and make such decree as may be required to determine and enforce the rights and liabilities of the various parties including such surety or sureties.

(Bills as evidence.) Intervening or cross-bills shall be on oath, and all bills sworn to shall be evidence of the matters therein charged unless denied by answer under oath.

(Amendments.) Amendments may be made to any bill or cross-bill at any time before final order, and if it shall appear that any party has had insufficient notice of any such proceedings, such further notice shall be given as the court shall think just.

§10, as amended by Act 394 of 1913, C. L. 1915 (14805), How. 2nd Ed. §13775, C. L. 1897 (10719). Section approved as to validity; C. H. Little Co. v. L. P. Hazen Co., 185 Mich. 316, 152 N. W. 95.

A prerequisite to filing bill to foreclose lien claimed by contractor is the furnishing of statement under section 4 (C. L. 1915, §14799). Where bill was filed before statement under section 4 was given the defect was held fatal. Wildey v. Gillett, 171 Mich. 153, 136 N. W. 1116. A bill may be filed by person whose claim is not due. §26 of act 179 of 1891 (C. L. 1915, §14821). The bill need not negative exceptions, contained in the statute, subsequent to the provisions declaring the lien, to the liability of the owner. Smalley v. Ashland Brown-Stone Co., 114 Mich. 105, 72 N. W. 29. The bill must allege that defendant was the owner of the land against which lien is sought, or interested therein. Knapp Electrical Works v. Mecosta Electric Co., 110 Mich. 547, 68 N. W. 245. A bill stating generally the interests of the lien holders, or incumbrances on the property, is sufficient. Bill to foreclose lien, joining as defendant receiver of debtor's estate, must aver leave of court to sue receiver. Bill held not bad on demurrer for failing to aver that payment of claim was demanded before bill filed. Steel Brick Siding Co. v. Muskegon Machine & Foundry Co., 98 Mich. 616, 57 N. W. 817. A bill will not lie to enforce a lien where the contract for building provided that the work should be done to the satisfaction of the owner and not paid for until satisfactory, where it appears that the owner's claim that the work was not completed to his satisfaction has substantial basis. Nor for bills on building contract, under which extras have been furnished, providing that until the value of extras has been fixed by arbitration or agreement, the same shall not be due until after arbitration. Boots v. Steinberg, 100 Mich. 135, 58 N. W. 657. Where the bill made the wife the sole defendant in a case where the claim of lien was served upon her, and the land belonged to her, but the building was erected under contract with the husband, the wife's land held not subject to lien. Hall v. Erkfitz, 125 Mich. 332, 84 N. W. 310.

Lis pendens probably not essential upon filing cross bill where one filed upon original bill. Hall Lumber Co. v. Gustin, 54 Mich. 624, 20 N. W. 616. The contractor is a necessary party defendant.

Godfrey Lumber Co. v. Kline, 160 Mich. 565 (567), 125 N. W. 682; Kerns v. Flynn, 51 Mich. 573, 17 N. W. 62; Prather Engineering Co. v. Detroit etc. Railway, 152 Mich. 585, 116 N. W. 376. Receiver of contractee is a necessary party to bill filed by contractor to foreclose a mechanics' lien and unless the bill makes a case against him, it must fail as to other defendants. Burk v. Muskegon Machine & Foundry Co. 98 Mich. 614, 57 N. W. 804. The objection that proper parties are not joined may be made at the hearing. Godfrey Lumber Co. v. Kline, 160 Mich. 565 (567), 125 N. W. 682. Affirmative relief may be obtained by a defendant against a co-defendant by an answer in the nature of a cross bill, the statute contemplating that all parties in interest shall have their respective rights adjudicated in one proceeding. Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 142, 71 N. W. 466. In suit to foreclose lien, defendant may maintain cross bill to recover damages sustained by claimant's failure to perform contract. Koch v. Sumner, 145 Mich. 358, 108 N. W. 725. But cannot recoup damages without praying affirmative relief. Scott v. Keeth, 152 Mich. 547, 116 N. W. 183; Koch v. Sumner, 145 Mich. 358, 108 N. W. 725; J. W. Reedy Elevator Mfg. Co. v. Peck, 149 Mich. 657 (667), 113 N. W. 300; Wildey v. Gillett, 171 Mich. 154, 136 N. W. 1116. A formal amendment to a bill adding a new party and not affecting the rights of a defendant who has answered, does not authorize him to file answer to the amended bill. Casserly v. Wayne Circuit Judge, 124 Mich. 157, 82 N. W. 841. Though bill to enforce lien has been taken as confessed against owner, an adverse lienor may assert the invalidity of a lien because of failure to serve owner with statutory statement under section 4. Wiltsie v. Harvey, 114 Mich. 131, 72 N. W. 134. All parties, including sureties, should be joined and all rights adjusted in a single proceeding. C. H. Little Co. v. L. P. Hazen Co., 185 Mich. 316, (326), 152 N. W. 95; Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 23 D. L. N. 74, 157 N. W. 96. Amendments have been permitted, to add new parties though year for bringing suit has expired. Prather Engineering Co. v. Detroit etc., Railway, 152 Mich. 582, 116 N. W. 376; Casserly v. Wayne Circuit Judge, 124 Mich. 157, 82 N. W. 841. And after hearing. Godfrey Lumber Co. v. Kline, 160 Mich. 565, (567), 125 N. W. 682. To properly restate the facts set forth in the original answer, though statute would bar new bill. Smalley v. Northwestern Terra-Cotta Co. 113 Mich. 141, 71 N. W. 466. Where the defendant appeared, held, that the bill might be amended by adding verification after the statutory period for filing bill had expired. Daschke v. Schellenberg, 125 Mich. 216, 84 N. W. 67; Prather Engineering Co. v. Detroit etc., Railway, 152 Mich. 582, 116 N. W. 376. An amendment to pleadings to change the name of contractor given in the statement of lien held not permitted. Lacy v. Piatt Power Etc. Co., 157 Mich. 544, 122 N. W. 112,

The sworn bill, unless denied under oath, makes a prima facie case. Green Bay Cut Stone Co. v. Fabry, 169 Mich. 544, 135 N. W. 312; Hannah & Lay Co. v. Mosser, 105 Mich. 18 (29), 62 N. W. 1120; Roberts v. Miller, 32 Mich. 289.

See notes under §§111 and 129.

For forms of bills of complaint for various parties, see Forms No. 18 to 23 inclusive, in Part III; of *lis pendens*, see Form No. 24; of various petitions and order of intervention, see Forms No. 31 to 35 inclusive; of order and cross-bills making surety company a party defendant, etc., see Forms No. 28 to 30 inclusive.

§ 113. Sec. 11. Questions for the Jury.

(Questions that may be submitted to jury.) Sec. 11. Every material question of fact may be submitted to a jury in the discretion of the court, as in ordinary chancery cases; and such trial shall be had upon a question stated or upon an issue formed under the direction of the court or otherwise, as the court shall order.

§11, C. L. 1915 (14806), How. 2nd Ed. §13776, C. L. 1897 (10720).

§ 114. Sec. 12. Court to Examine Claims.

(Ascertainment of amounts due.) The court shall examine all claims that shall be presented, and shall ascertain and determine the amount due to each creditor who has a lien of the kind before mentioned upon the estate in question, and every such claim that is due absolutely and without any conditions, although not then payable, shall be allowed, with a rebate of interest to the time when it would become payable.

(Attorneys' fees.) The court may, in its discretion, allow a reasonable attorney's fee when judgment shall be rendered in such proceeding, in favor of the parties succeeding therein.

§12 amended by Act 143 of 1897; C. L. 1915 (14807), How. 2nd Ed. §13777, C. L. 1897 (10721).

The burden is upon the claimant to establish the value of services for which lien is claimed. Doetsch v. Wetlaufer, 157 Mich. 202, 121 N. W. 746. See notes to Secs. 103 and 118. Actual disbursements and reasonable solicitor's fee may be taxed. Wisniewski v. Nawrocki, 153 Mich. 523, 116 N. W. 1065. Permitting actual disbursements to be taxed as attorney's fees, does not invalidate statute. Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 23 D. L. N. 73 (76), 157 N. W. 96. Where one record and one brief filed in several cases, it was held on the dismissal of the original bills and a cross-bill that but one solicitor's fee would be taxed for defendant owner. Hannah & Lay Co. v. Mosser, 105 Mich. 19, 62 N. W. 1120, Smalley v. Gearing, 121 Mich. 190 (206), 79 N. W. 1114, 80 N. W. 797; see Bourget v. Donaldson, 83 Mich. 478, 47 N. W. 326. Clark v. Raymond, 27 Mich. 456 (462).

§ 115. Sec. 13. Owner Fails to Perform His Contract.

(Rights of lienor where performance of contract prevented.) When the owner, part owner or lessee, shall have failed to perform his part of the contract, and by reason thereof, the other party shall, without his default, have been prevented from completely performing his part, he shall be entitled to a reasonable compensation for as much thereof as he has performed, in proportion to the price stipulated for the whole, and the court shall adjust his claim accordingly.

§13, C. L. 1915 (14808), How. 2nd Ed. §13778, C. L. 1897 (10722).

§ 116. Sec. 14. Final Decree.

(Decree.) Upon the final decree the court may order a sale of the buildings or machinery separate, or the lands, buildings, machinery, structure, or improvements, together, by a circuit court commissioner or receiver, or may order the property into the hands of a receiver to be leased or rented from time to time under the direction of the court until the liens shall be discharged or make such other order or dispostion of the premises as justice may require. If upon the coming in and confirmation of the final report any portion of the liens shall still be unpaid, the court may enter personal decree for the same against the party who may be personally liable therefor, and execution shall issue for the same as upon other personal decrees rendered by the court.

§14, C. L. 1915, (14809), 2nd Ed. How. §13779, C. L. 1897 (10723). An execution to collect a money decree is permissible in a suit to foreclose a lien. Scott v. Keeth, 152 Mich. 547, 116 N. W. 183. For Form of decree, see Form No. 39 in Part III.

§ 117. Sec. 15. Sale of Part of Premises.

(Sale in parcels.) If any part of the premises can be separated from the residue and sold without damage to the whole, and if the value thereof shall be sufficient to satisfy all the claims proved in the case, the court may order a

sale of that part, if it shall appear to be most for the interest of all the parties concerned.

§15, C. L. 1915 (14810), How. (10724).
2nd Ed. §13780, C. L. 1897

§ 118. Sec. 16. All Claims Being Ascertained.

(Distribution of proceeds.) If the claims against the estate are all ascertained at the time of ordering the sale, the court may at the same time order the officer to pay over and distribute the proceeds of the sale, after deducting all lawful charges and expenses to and among the several creditors to the amount of their respective claims, if there is sufficient therefor; and if there is not sufficient, then to divide and distribute the same among the creditors in proportion to the amount due to each of them: Provided, however, That,

(Priorities among lienors.) Such original contractor shall be subrogated to the rights of his subcontractors, material men and laborers, who shall first be paid in full; and that the subcontractors shall be subrogated to the rights of their materialmen and laborers, who shall first be paid in full.

§16, C. L. 1915 (14811), How. (10725). See notes to Secs. 103
2nd Ed. §13781, C. L. 1897 and 114.

§ 119. Sec. 17. All Claims Not Ascertained.

(Postponement of distribution.) If the claims shall not have been ascertained when the sale is ordered, or if for any other reason it shall be deemed proper to postpone the order of distribution, the court may direct the officer to bring the proceeds of sale into court to be disposed of according to the order of such court; and if in consequence of the claims of attaching creditors, or for other cause, the whole cannot be properly distributed at once, the court may make two or more successive orders of distribution as the circumstances may require.

§17, C. L. 1915 (14812), How. (10726).
2nd Ed. §13782, C. L. 1897

§ 120. Sec. 18. Surplus.

(**Disposition of surplus.**) If there be any surplus of the proceeds of the sale, after making all the payments before mentioned, it shall forthwith be paid over to the owner, part owner, lessee, or other person entitled thereto; but such surplus shall be liable to be attached or taken in execution in like manner as if it proceeded from a sale made under execution.

§18, C. L. 1915 (14813), How. (10727).
2nd Ed. §13783, C. L. 1897

§ 121. Sec. 19. Making of Sales.

(**Sale and redemption.**) Sales under such decrees shall be made in the same manner as in ordinary cases of mortgage foreclosure unless otherwise directed by the court; and all lands sold under such order or decree of the court may be redeemed at any time within fifteen months from the time of filing such bill for such foreclosure.

§19, C. L. 1915 (14814) How. (10728).
2nd Ed. §13784, C. L. 1897

§ 122. Sec. 20. Several Claimants.

(**Priorities of attaching creditors.**) When there are several attaching creditors they shall, as between themselves, be entitled to be paid according to the order of their respective attachments, but when several creditors, who are entitled to the lien provided for in this act, have equal rights as between themselves, and the fund shall be insufficient to pay the whole they shall share it equally in proportion to their respective claims.

§20, C. L. 1915 (14815), How. (10729). See notes to Secs. 103
2nd Ed. §13785, C. L. 1897 and 118.

§ 123. Sec. 21. Costs.

(**Costs.**) The costs in all cases shall be subject to the discretion of the court and shall be paid out of the proceeds

of the sale, or by any parties to the suit, as justice and equity may require.

§21, C. L. 1915 (14816), How. 2nd Ed. §13786, C. L. 1897 (10730). See note to Sec. 114.

§ 124. Sec. 22. Action Not Barred.

(Actions at law.) Except as herein otherwise expressly provided, nothing in this act contained shall be construed to prevent any creditor in any such contract from maintaining an action thereon at common law in like manner as if he had no lien for the security of his debt.

§22, C. L. 1915 (14817), How. 2nd Ed. §13787, C. L. 1897 (10731). Notwithstanding claims of lien have been filed, the contractor's assignee may bring action upon the contract where all liens filed have been assigned to him and the time for filing other liens has expired. Cady v. Fairplain Literary Ass'n., 135 Mich. 295, 97 N. W. 680. See notes to Sections 106 and 103.

§ 125. Sec. 23. Lien Holder Executing Discharge.

(Discharge of lien.) When the debt secured by such lien is fully paid, the lien holder shall execute to such owner, part owner or lessee, or other person having an interest or title in the lands, [building] buildings, machinery, structure, or improvements affected by such lien, a discharge as in case of a discharge of a mortgage, or shall indorse such discharge on such claim of lien filed, and upon refusal to do so on demand, shall be subject to like penalties as are provided by law for refusal to discharge mortgages which have been fully paid.

§23, C. L. 1915 (14818), How. 2nd Ed. §13788, C. L. 1897, (10732). For form of discharge see Form No. 10 in Part III.

§ 126. Sec. 24. Death of Claimant.

(Abatement of proceedings.) If any lien claimant shall die before the commencement of a suit thereon, or the taking of proceedings to enforce the same, the suit or proceeding may be commenced and prosecuted by his executors or administrators, or if commenced in his lifetime, may be prose-

cuted by them, as it might have been by the deceased himself if living.

§24, C. L. 1915 (14819), How. 2nd Ed. §13789, C. L. 1897 (10733). For forms of affidavit and certificate respectively see Forms No. 8 and 9 in Part III.

§ 127. Sec. 25. Assignment.

(Assignment of liens.) All liens or claims for liens which may arise or accrue under the terms of this act shall be assignable, and proceedings to enforce such liens may be maintained by and in the name of the assignees, who shall have as full and ample power to enforce the same as if such proceedings were taken under the provisions of this act by and in the name of the lien [claimants] claimant themselves.

(Security for debt, effect of taking.) No lien provided for in this act shall be defeated or waived by the taking by the lien claimant, from any person, of any security for such debt other than upon the real estate itself, in the absence of express agreement that the taking of such security shall be a waiver of the lien.

§25, C. L. 1915 (14820), How. 2nd Ed. §13790, C. L. 1897 (10734). The account may be assigned before or after the lien is claimed. McAllister v. Des-Rochers, 132 Mich. 381, 93 N. W. 887; Gardner v. LeFevre, 180 Mich. 219 (221), 146 N. W. 653. A settlement after assignment, between the owner and the assignor's trustee in bankruptcy, appointed after the assignment, cannot affect the rights of the assignee. Kudner v. Bath, 135 Mich. 241, 97 N. W. 865. Assignment to an attorney for purpose of collection, to avoid expense and multiplicity of suits is permissible. Smedley v. Dregge, 101 Mich. 200, 59 N. W. 411. For form of assignment see Form No. 17 in Part III. Acceptance of the contractor's note does not prevent material man asserting lien for materials furnished for price of which note given. Smalley v. Gearing, 121 Mich. 191, 79 N. W. 1114, 80 N. W. 797. See Blakeley v. Moshier, 94 Mich. 299 (303), 54 N. W. 54; Perkins v. The Golden Girl, 185 Mich. 200, 151 N. W. 660. Nor does reservation of title to machinery furnished. Warner Elevator Mfg. Co. v. Capital Etc., Co. 127 Mich. 324, 86 N. W. 828; Peninsular General Electric Co. v. Norris, 100 Mich. 496, 59 N. W. 151; Presque Isle Sash & Door Co. v. Reichel, 179 Mich. 466, (476-7); 146 N. W. 231; Perkins v. The Golden Girl, 185 Mich. 200, 151 N. W. 660.

§ 128. Sec. 26. Claims Not Due.

(Claims not due.) Parties entitled to liens under this act whose claims are not due and payable, may give notice

of their intent to claim a lien, and may become parties to any suit to enforce a lien, or institute such suit or proceedings themselves, and their claims shall be allowed subject to a reduction of interest, if such claims are not due at the time of the rendition of decree, but no process shall issue or proceedings be had to enforce a decree for such claims until the same mature.

§26, C. L. 1915 (14821), How. 2nd Ed. §13791, C. L. 1897, (10735). See p. 169. For clauses of bill or cross bill to enforce claims not due, see Form No. 23 Part III.

§ 129. Sec. 27. Remedial Statute.

(**Statutory construction.**) This act is hereby declared to be a remedial statute and to be construed liberally to secure the beneficial results, intents and purposes thereof; and a substantial compliance with its several provisions shall be sufficient for the validity of the lien or liens hereinbefore provided for, and to give jurisdiction to the courts to enforce the same.

(**Amendments.**) Amendments to any process, pleadings or proceedings in such actions to enforce the liens given by this act, either in form or substance, shall be allowed at any time before final decree is rendered, on application of either party upon such terms and conditions as justice may require, and the security for costs may be required as in other chancery cases.

(**Practice.**) The practice in all suits brought to enforce liens under the provisions of this act shall be the same as in ordinary chancery cases and the court shall have the same power and jurisdiction over the subject matter and parties to the suit as in other chancery cases, except as herein otherwise expressly provided.

(**Appeals.**) And in any case where a decree or final order shall be made by any circuit court in chancery, or the judge thereof, under the provisions of this act, either party who may consider himself aggrieved by such order or decree may appeal therefrom to the supreme court, in the same

manner as is provided by law for appeal in ordinary chancery cases; and the powers, duties and jurisdiction of the supreme court in relation to such appeal shall be the same as are provided by law in relation to appeals in ordinary chancery cases.

§27 as amended by Act 143 of 1897; C. L. 1915 (14822), How. 2nd Ed. §13792, C. L. 1897, (10736). Upon whether a lien attaches, a strict construction of the statute is proper, but after lien has attached statute should be liberally construed to fulfill its objects. Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141, 71 N. W. 466; Sheridan v. Cameron, 65 Mich. 680, 32 N. W. 894; Lacy v. Piatt Power Etc. Co., 157 Mich. 544, 122 N. W. 112. The statute is subject to strict construction. Hall v. Erkfitz, 125 Mich. 334, 84 N. W. 310; Wildey v. Gillett, 171 Mich. 153, 136 N. W. 1116. Though in some cases the court has appeared to depart from this rule. Smalley v. Gearing, 121 Mich. 196, 79 N. W. 1114, 80 N. W. 797. Rights under lien law cannot be extended beyond statute provisions. Sterner v. Haas, 108 Mich. 488, 66 N. W. 348. The creditor must comply with the statute to be entitled to lien. Battle Creek Lumber Co. v. Poland, 150 Mich. 690, 114 N. W. 671. The burden of proof of everything necessary to establish a lien is upon the complainant. Roberts v. Miller, 32 Mich. 289. See notes under sections 111 and 112. Objection to a petition to enforce mechanic's lien that it does not implead necessary parties may be taken by answer or at the hearing. Prather Engineering Co. v. Detroit etc. Railway, 152 Mich. 582, 116 N. W. 376. And on hearing a general demurrer defendant may orally assign causes of demurrer coextensive with the demurrer filed. Burk v. Muskegon Machine & Foundry Co., 98 Mich. 614, 57 N. W. 804. A bill to enforce mechanic's lien not sworn to is demurrable. Daschke v. Schellenberg, 125 Mich. 216, 84 N. W. 67. And objection that a receiver is made party without leave may be taken by demurrer. Prather Engineering Co. v. Detroit etc. Railway, 152 Mich. 582, 116 N. W. 376. Special, not general demurrer proper to raise objection that answer does not pray for process. Smalley v. Ashland Brown-Stone Co., 114 Mich. 104, 72 N. W. 29. Where several defendants join in a general demurrer, only such grounds of demurrer will be considered as are available to all the demurrants. Burk v. Muskegon Machine & Foundry Co., 98 Mich. 614, 57 N. W. 804. Issues formerly raised by plea in abatement or demurrer may now be raised by motion to dismiss; for forms of such motion and clause of answer by owner as well as cross bill by owner for defective performance, etc.; see Forms No. 25 to 27 inclusive, in Part III. For forms on appeal, see Forms No. 40 to 43 inclusive.

§ 130. Sec. 28. Publication of Notice.

(Absent defendants.) When any defendant resides out of the state, or is absent from the state or concealed therein, or cannot be found by reason of his continued absence from

his place of residence, the complainant may cause notice to be given by publication in like manner and upon the same conditions as in ordinary suits in chancery.

§28, C. L. 1915 (14823), How. (10737). 2nd Ed. §13793, C. L. 1897

§ 131. Sec. 29. Construction of Certain Words.

(Terms construed.) For the purpose of this act the words "owner, part owner or lessee" shall be construed to include all the interest, either legal or equitable, which such person may have in the real estate upon which the improvements contemplated by this act are made, including the interest held by any person under contracts of purchase, whether in writing or otherwise. The word "materialman" as used in this act, shall be construed to include all persons by whom any materials are furnished in or for building, altering, improving, repairing, erecting, or ornamenting, or putting in any house, building, machinery, wharf or other structure or walk or walks. The word "laborer" shall be construed to include any mechanic, workman, artisan or laborer, employed in or about any such work as hereinbefore specified. The word "improvements" shall be construed to include sidewalks as hereinbefore specified.

§29 as amended by Act 17 of 1903; C. L. 1915, (14824), How. 2nd Ed. §13794, C. L. 1897 (10738). Where a contractor furnishes material he is to be considered as a material man. Smalley v. Gearing, 121 Mich. 191, 79 N. W. 1114, 80 N. W. 797. Manufacturers selling materials made in their own shops are material men. Kerr-Murray Mfg. Co. v. Kalamazoo Heat, Light & Power Co., 124 Mich. 111, 82 N. W. 801. A plumber and gas fitter, furnishing material and labor for plumbing, roofing, steam heating and electric wiring a building held a contractor and not a material man. Sterner v. Haas, 108 Mich. 488, 66 N. W. 348. As to who is material man, see also People v. Title Guaranty & Trust Co., 154 Mich. 614, 118 N. W. 586; Kuenzel v. National Construction Co., 159 Mich. 133, 123 N. W. 801. See note to §136.

§ 132. Sec. 30. Contracts Already Made.

(When act not to apply.) This act shall not be con-

strued to apply to any contract made or entered into at any time before this act shall take effect.

§30, C. L. 1915 (14825), How. 2nd Ed. §13795, C. L. 1897 (10739).

§ 133. Sec. 31. Repealing Section.

(Acts repealed—saving clause.) Act number two hundred and fifty-eight of the session laws of eighteen hundred and seventy-nine, as amended by the several acts amendatory thereof, relative to the liens of mechanics and others, being sections eight thousand, three hundred and seventy-seven to eight thousand three hundred and ninety-eight, both inclusive, of the statutes of the State of Michigan as compiled by Andrew Howell, as amended by the several acts amendatory thereof, is hereby repealed, save that the same shall remain in full force and effect so far as to allow proceedings to be taken thereunder upon any contract in existence at the time when this act takes effect: *And provided,* That all lien suits, actions and proceedings accruing or taken thereunder shall not be affected by the passage of this act, but the same shall be proceeded with and concluded as though this act had not been passed; and save also, that such former laws are not repealed in so far as they repeal any other act or acts, or part or parts thereof. Also act number two hundred and seventy of the session laws of eighteen hundred and eighty-seven, relative to the liens of mechanics and others, is hereby repealed.

§31, C. L. 1915 (14826), How. 2nd Ed. §13796.

DISCHARGE OF LIENS.

§ 134. Sec. 1. Discharge of Lien Where No Proceedings Commenced to Enforce.
135. Sec. 2. Application of Act for Discharge for Failure to Enforce.

§ 134. Sec. 1. Discharge of Lien Where No Proceedings Commenced to Enforce.

Whenever any [statement] statements shall have been filed in the office of any register of deeds, claiming a lien upon any real estate by any mechanic or other person, in accordance with act number one hundred and seventy-nine of the session laws of eighteen hundred and ninety-one, of the State of Michigan, or acts amendatory thereof, and the time shall have elapsed within which proceedings should be commenced to enforce the same, and no such proceedings shall have been commenced, the owner of said real estate or of any interest therein, his agent or attorney, may make and present to the register of the court in which such proceedings might have been taken, an affidavit showing the time when such statement claiming lien shall have been filed and the names of the parties thereto, and thereupon it shall be the duty of such register to make examination of the records in his office, and if it shall appear upon such examination that no such proceedings shall have been commenced within the time required by law, it shall be the duty of such register to execute and deliver to such owner or part owner a certificate of such [fact] facts under his hand and the seal of said court. The said register of deeds, on receipt of such certificate and on payment to him of a fee of twenty-five cents, shall file and preserve the same, and shall make an abstract thereof in the book kept by him for the purpose of entering such claims of lien; and shall mark on the record containing the abstract of such [statement]

statements of lien "discharged by certificate of register of said court," naming it, with the date of the filing of such certificate, and thereafter the effect of such statement and lien shall cease and determine.

Sec. 1, Act 172 of 1893, C. L. 1915 (11787), How. 2nd Ed. §13797, C. L. 1897 (9055), entitled, "An act to provide for the discharge from record of statements claiming liens upon real estate." For forms of affidavit and certificate respectively see Forms No. 8 and 9 in Part III.

§ 135. Sec. 2. Application of Act for Discharge for Failure to Enforce.

The provisions of this act shall also apply to cases where such claim of lien shall have been filed under former statutes and where rights thereunder have been saved in accordance with section thirty-one of said act one hundred and seventy-nine, of the session laws of eighteen hundred and ninety-one of the State of Michigan, in any case where the time within which proceedings should have been commenced according to the terms of the statute under which such claim of lien shall have been filed, shall have elapsed.

§2, C. L. 1915 (11788), How. 2nd Ed. §13798, C. L. 1897 (9056).

PUBLIC BUILDINGS AND WORKS.

§ 136. Bond to Protect Subcontractors, Materialmen and Laborers on Public Buildings and Works.
137. Subcontractors—Written Notice—When Protected by Security.
138. Bond—To Whom Executed—Sureties—By Whom Approved, etc.
139. Recovery on Bond—Defenses—Costs.

§ 136. Bond to Protect Subcontractors, Materialmen and Laborers on Public Buildings and Works.

When public buildings or other public works are about to be built, repaired or ornamented under contract at the expense of the State, or of any county, city, village, township or school district thereof, it shall be the duty of the board of officers or agents, contracting on behalf of the State, county, city, village, township or school district, to require sufficient security by bond for the payment by the contractor of all subcontractors and for the payment for all labor performed and materials furnished in the erection, repairing or ornamenting of such building or works.

§1, Act 187 of 1905, C. L. 1915 (14827), How. 2nd Ed. §13839, See C. L. 1897 (10743). See Forms No. 13 and 14 in Part III.

In General—Constitutionality, Application and Construction. This Act (187 of 1905) entitled: "An act to insure the payment of sub-contractors and wages earned and material used in constructing, repairing or ornamenting public buildings and public works," supersedes Act 94 of 1883, as amended by Act 45 of 1885. The act of 1883 was held constitutional and enforceable in Plummer v. Kennedy, 72 Mich. 295, 40 N. W. 433. The act of 1883 as amended by Act 45 of 1885 (3 How. 1st Ed. §8411a) was held not to apply to Regents of the University; Weinberg v. Regents of University, 97 Mich. 246, 56 N. W. 605. Previous to 1905 this section was as follows: "That when public buildings, or other public works or improvements are about to be

built, or ornamented under contract, at the expense of this State, or of any county, city, village, township, or school district thereof, it shall be the duty of the board of officers, or agents, contracting on behalf of the State, county, city, village, township, or school district, to require sufficient security by bond for the payment by the contractor, and all sub-contractors, for all labor performed, or materials furnished in the erection, repairing, or ornamenting of such building, works or improvements." (Act 45 of 1885; C. L. 1897, §10743).

Contract Rights—In General. Where contractor failed to give the required security both parties being ignorant of the law requiring it, and afterwards on request refused to do so and made default in performance, the building being completed by the other party, the latter may in suit by contractor for balance deduct amounts due material men and laborers and demands which may be made upon the officers by reason of failure to require bond. Wells v. Board of Education, 78 Mich. 261, 44 N. W. 267. In the absence of appropriation by the parties, payments on an account for materials for use in several improvements will be applied to the charges in the order of their dates. People v. Sheehan, 118 Mich. 539, 77 N. W. 88. On failure of contractor to complete building, other party may complete and offset against contract price all necessary and reasonable expenses of completion. Wells v. Board of Education, 78 Mich. 261, 44 N. W. 267. The owner is not entitled to make payments to contractor in excess of amounts called for in architect's certificates. Doyle v. Faust, 187 Mich. 109, 153 N. W. 725.

Duty and Liability of Public Officers. The statutory bond should be required contemporaneously with execution of the contract. Owen v. Hill, 67 Mich. 47, 34 N. W. 649. Bond is not required where municipality itself makes the contract to purchase materials for municipal purposes, though in such case if a bond is given its security is available to a person furnishing materials to the principal. People v. Newberry, 152 Mich. 292 (295-296), 116 N. W. 419. Public officers neglecting to require bond of contractor are liable for materials furnished and labor performed. Michaels v. McRoy, 158 Mich. 605, 123 N. W. 37; 148 Mich. 579, 112 N. W. 129; Alpena v. Title Guaranty & Surety Co., 158 Mich. 678, 123 N. W. 536; Kuennan v. United States Fidelity & Guaranty Co., 159 Mich. 126, 123 N. W. 799; Smith v. Hubbell, 142 Mich. 647, 106 N. W. 547; Huebner v. Nims, 132 Mich. 657, 94 N. W. 180; Wells v. Board of Education, 78 Mich. 260, 44 N. W. 267; Plummer v. Kennedy, 72 Mich. 295, 40 N. W. 433; Owen v. Hill, 67 Mich. 43, 34 N. W. 649. Though where a bond was required which was insufficient because of wrongful justification of sureties, no liability of public officers would arise. Huebner v. Nims, 132 Mich. 657, 94 N. W. 180. Where contractors to whom materials were furnished, shown irresponsible, remedy against them need not be exhausted before suit to charge public officers. Michaels v. McRoy, 158 Mich. 605, 123 N. W. 37. This, though persons furnishing materials incorrectly supposed themselves protected by the mechanics' lien law and knew the statutory bond had not been given but did not proceed in sole reliance on responsibility of the contractors. Michaels v. McRoy, 158 Mich. 605, 123 N. W. 37. In proceeding against public officers it is incumbent on plaintiff to show both the wrong and injury, and plaintiff must allege and show the failure to require bond and that his claim cannot be collected of

contractor. Michaels v. McRoy, 158 Mich. 579, 112 N. W. 129. The right of action against public officers accrues only when labor is done or materials furnished and an injury results to the materialman, and does not accrue immediately on failure to require bond. Michaels v. McRoy, 148 Mich. 579, 112 N. W. 129. This, liability of public officers to pay for labor and materials furnished for public buildings arising on failure to require security is in the nature of a suretyship when they have acted in good faith, and they are not obliged to await suit before making payment. Wells v. Board of Education, 78 Mich. 260 (270), 44 N. W. 267. The municipality receiving benefit of materials furnished may recognize the moral obligation to the furnishers and pay for the same. Michaels v. McRoy, 158 Mich. 608, 123 N. W. 37; Stockdale v. School District, 47 Mich. 226, 10 N. W. 349. Though upon payment of a claim of this character members of a village council in default are disqualified in voting on allowance of the claim. Smith v. Hubbell, 142 Mich. 637 (645), 106 N. W. 547. The liability of public officers on failure to require bond, as resting not on the contract but on neglect of duty. Michaels v. McRoy, 148 Mich. 579, 112 N. W. 129; Staffon v. Lyon, 110 Mich. 261, 68 N. W. 151. A surety on a contractor's bond for faithful performance cannot by reason of trustees' failure to require contractor to execute bond, recover from them moneys due him for materials. Owen v. Hill, 67 Mich. 43, 34 N. W. 649.

Contract or Bond; Form of. The contract may be informal or even unsigned, if contract relations were in fact entered into. Kuennan v. Fidelity & Guaranty Co., 159 Mich. 126-127, 123 N. W. 799. The purpose of the statute is not defeated by the giving of a bond not in precise statutory form, or because it runs to the municipality instead of to the people. Alpena v. Title Guaranty & Surety Co., 158 Mich. 680, 123 N. W. 536; Board of Education v. Grant, 107 Mich. 151, 64 N. W. 1050. The bond may be valid though the obligee named not the one designated by statute, this held where given to Board of Education instead of to people. Board of Education v. Grant, 107 Mich. 151, 64 N. W. 1050. As statute does not prescribe form of bond or expressly declare bonds not in accordance therewith void, a bond, though containing provisions in excess of those required, if divisible, will be sustained so far as it does conform to statute. Board of Education v. Grant, 107 Mich. 151, 64 N. W. 1050.

Who Included in Protection of Statute and Bond. Sub-contractors—Materialmen. Subcontractors were not entitled to the protection of the required bond previous to 1905. People v. Cotteral, 119 Mich. 27 (32), 77 N. W. 312; People v. Campfield, 150 Mich. 675 (676), 114 N. W. 659; Avery v. Ionia County Supervisors, 71 Mich. 538, 39 N. W. 742. As to who is subcontractor and who materialman, see: United States v. Jack, 124 Mich. 213, 82 N. W. 1049; People v. Cotteral, 119 Mich. 27, 77 N. W. 322; Avery v. Board of Supervisors, 71 Mich. 538, 39 N. W. 742; People v. Campfield, 150 Mich. 675, 114 N. W. 659; People v. Collins, 112 Mich. 605, 71 N. W. 153; Staffon v. Lyon, 104 Mich. 249, 62 N. W. 354; People v. Title Guaranty & Trust Co., 154 Mich. 614, 118 N. W. 586; People v. Banhagel, 151 Mich. 41, 114 N. W. 669; Sterner v. Haas, 108 Mich. 488, 66 N. W. 348; People v. Powers, 108 Mich. 339, 66 N. W. 215. Under similar Federal law subcontractors are protected. United States v. Jack, 124 Mich. 210, 82 N. W. 1049.

One furnishing terra-cotta for a contractor for a public building, the material being specially molded and according to the plans and specifications of the original contract, is a subcontractor. People v. Cotteral, 119 Mich. 27, 77 N. W. 312. One furnishing trimmings according to specifications of original contract is subcontractor and must conform to statutory requirements as to notice to recover on bond. People v. Finn, 162 Mich. 481, 127 N. W. 704. One furnishing interior trim and shop work according to original specifications in contract is a subcontractor. People v. Banhagel 151 Mich. 41, 114 N. W. 669. One who furnishes materials to a contractor is not a subcontractor unless he agrees that the original contract shall be the standard by which the performance of his contract shall be judged. People v. Campfield, 150 Mich. 675, 114 N. W. 659. One furnishing a certain style of sash stiffeners known to the trade, according to measurements to be furnished by the contractor, is a materialman and not a subcontractor, though the style of stiffener is named in original contract and specifications. People v. Campfield, 150 Mich. 675, 114 N. W. 659. Where the subcontract contained specifications not in the original contract plaintiff held a materialman. People v. Title Guaranty & etc. Co., 154 Mich. 614, 118 N.W. 586. One molding and supplying concrete blocks to sewer contractor at an agreed price per block held a materialman. People v. National Construction Co., 159 Mich. 133, 123 N. W. 801. That curbstone furnished to paving contractor for a lump sum rather than for an agreed price per foot or yard does not render furnisher subcontractor to exclude from protection of statutory security. People v. Powers, 108 Mich. 339, 66 N. W. 215. Plaintiffs who though subcontractors, in addition to things required in the original contract, performed service and furnished materials not embraced therein were held laborers and materialmen and as such entitled to enforce claims against surety on contractor's bond. People v. Collins, 112 Mich. 605, 71 N. W. 153.

Extent of Liability of Surety. The bond, though its wording might seem to lead to such conclusion, will not be construed merely to indemnify municipal officers, but is intended to secure payment of all claims and will sustain a direct action against the surety for the benefit of materialmen. Alpena v. Title Guaranty & Surety Co., 158 Mich. 681, 123 N. W. 536. Question of liability of a paid surety should in case of doubt be resolved against the surety. Doyle v. Faust, 187 Mich. 109, 153 N. W. 725. The obligation of the surety should be read in connection with the contract and specifications referred to in the bond. Doyle v. Faust, 187 Mich. 108, 153 N. W. 725. Labor in operating a dredge in constructing public work for city may be recovered for against surety. Alpena v. Title Guaranty & Surety Co., 159 Mich. 334, 123 N. W. 1127. See Clark v. Raymond, 27 Mich. 456. Surety on statutory bond is not liable for labor and materials provided for benefit of contractor in repairing his pumps and machinery. City of Alpena v. Title Guaranty & Surety Co., 159 Mich. 329, 123 N. W. 1126. The statutory bond does not include cartage of supplies for dredge used in prosecution of the work under the contract. Alpena v. Murray Co., 159 Mich. 336, 123 N. W. 1128. Sureties not liable for materials purchased for improvement but subsequently rejected and sold to others. People v. Sheehan, 118 Mich. 539, 77 N. W. 88. Liability of sureties as against materialman's claim, not

affected by fact that latter was paid his antecedent debt of contractor from funds received by contractor under his contract. It is not essential in the absence of contract, that contractor's earnings be applied to pay laborers and materialmen upon the particular job. People v. Powers, 108 Mich. 339, 66 N. W. 215.

Release or Estoppel of Surety. Sureties consenting to a change in arrangement between the parties are thereafter estopped to claim release by reason thereof. People v. Banhagel, 151 Mich. 40, 114 N. W. 669. Sureties not released because payments to contractor made faster than provided in contract. People v. Banhagel, 151 Mich. 40, 114 N. W. 669. Surety held not released by variation in construction from contract though it may insist upon requirements which are strictly a condition of its liability. Doyle v. Faust, 187 Mich. 108, 153 N. W. 725. Paid surety held not released by materialman's taking contractor's note for balance of his account, as paid surety must show injury to be entitled to release. People v. Bowen, 187 Mich. 257, 153 N. W. 672. Paid surety cannot benefit by plaintiff subcontractor's failure to give timely notice under section 2 where surety neither alleged nor proved actual injury from such failure. People v. Traves, 188 Mich. 416, 154 N. W. 120; Doyle v. Faust, 187 Mich. 108 (123), 153 N. W. 725; People v. Bowen, 187 Mich. 257, 153 N. W. 672. Failure of municipal authorities to approve bond cannot be shown by sureties to avoid liability. People v. Carroll, 151 Mich. 233, 115 N. W. 42. Where bond delivered by sureties without principal's signature they are estopped to object unless there was agreement that principal should sign before bond became valid. People v. Carroll, 151 Mich. 233, 115 N. W. 42. Acceptance by materialman of contractor's note and renewals which were not paid, did not operate to release a paid surety who suffered no injury. People v. Traves, 188 Mich. 346, 154 N. W. 130. Negotiations between contractor and creditors for compromise of contractor's indebtedness which, as contractor understood it, did not reach an agreement, was not sufficient to release a paid surety, though certain creditors believed a compromise had been reached. People v. Traves, 188 Mich. 345, 154 N. W. 130. The rule of strictissimi juris does not usually apply to determining release of a paid surety company. People v. Traves, 188 Mich. 347, 154 N. W. 130. Under similar Federal law materialmen held protected by contractor's bond though portion of the materials attached in transit by contractor's creditors and notwithstanding architect's approval of materials in place was to be a condition precedent. United States v. Jack, 124 Mich. 210, 82 N. W. 1049.

Proceedings Against Sureties. Where statutory bond ran to municipality instead of to people, held action thereon must be in the name of city. People v. Laidlaw, 120 Mich. 358, 79 N. W. 576. Such a bond would however, be valid and enforceable in the name of the municipality or public agency. Board of Education v. Grant, 107 Mich. 152, 64 N. W. 1050, also where bond ran to a named city instead of to the people as the statute provides the city may bring action on the instrument for the benefit of persons intended to be protected. Alpena v. Title Guaranty & etc. Co. 159 Mich. 329, 123 N. W. 1126. Bond required by city to protect against negligence of contractor may be proceeded upon by persons sustaining injury. Cox v. Fidelity Co., 157 Mich. 59, 121 N. W. 494. While the statute does not expressly authorize as-

sumpsit, its language is broad enough to authorize it. People v. Cotteral, 119 Mich. 27, 77 N. W. 312. Joinder of sureties on different bonds for distinct improvements in suit of materialmen improper and separate action should be brought for balance due on each improvement. People v. Sheehan, 118 Mich. 539, 77 N. W. 88. Action on bond may be in justice court where amount claimed is within the jurisdiction, though the penalty of the bond exceeds that jurisdiction. People v. Cotteral, 115 Mich. 43, 73 N. W. 19. Sufficiency of proof of delivery and of correctness of the account reviewed and evidence held sufficient to present to jury. People v. Traves, 188 Mich. 345, 154 N. W. 130. In action against surety plaintiff's books confirmed by testimony showing their correctness are admissible to show the amount of material delivered though they would not be to prove performance of contract to deliver. Kuennan v. Fidelity & Guaranty Co., 159 Mich. 122, 123 N. W. 79. Practice in suit to enforce liability on bond. People v. Grant, 117 Mich. 613, 76 N. W. 99. Evidence of sale and delivery held sufficient. People v. Cotteral, 115 Mich. 43, 73 N. W. 19.

§ 137. Subcontractors—Written Notice—When Protected By Security.

In the case of a subcontractor, he shall give notice in writing before payment is made for the work or materials furnished by him to the said board of officers or agents, that he is a subcontractor for the doing of some part of such work which he shall specify in his notice and that he relies upon the security of the bond by this act required to be given by the principal contractor, and that in the case of the giving of such notice to the said board of officers or agents said subcontractor shall also notify the principal contractor that he has done so and whenever this shall have been done, the said subcontractor shall be entitled, subject to the rights of the persons with whom he has contracted for labor and materials, to the benefit of the security given by the principal contractor, and to be subrogated to the liens of the persons who have performed labor or furnished materials for such building, repairs or ornamentation, whom he shall have actually paid, but the subcontractor and the persons who shall have performed labor or furnished materials to him shall not in the aggregate be entitled to receive larger sums than may be required from the principal contractor under his contract with the subcontractor, nor

shall this act be construed to change in any way the contract which may have been made between the principal contractor and the subcontractor, except when such contract shall attempt to relieve the principal contractor as against the demands of those performing labor or furnishing materials to the subcontractor.

§2, Act 187 of 1905, C. L. 1915 (14828), How. 2nd Ed. §13840. See Form No. 15 in Part III.

Liability of sureties as against materialman's claim, not affected by fact that latter was paid his antecedent debt of contractor from funds received by contractor under his contract. It is not essential in the absence of contract, that contractor's earnings be applied to pay laborers and materialmen upon the particular job. People v. Powers, 108 Mich. 339, 66 N. W. 215. See People v. Traves, 188 Mich. 415, 154 N. W. 120.

§ 138. Bond—To Whom Executed — Sureties — By Whom Approved, etc.

Such bond shall be executed by such contractor to the people of the State of Michigan in such amount and with such sureties as shall be approved by the board of officers or agents acting on behalf of the State, county, city, village, township, or school district as aforesaid, and shall be conditioned for the payment by such contractor to any subcontractor or by any such contractor or subcontractor as the same may become due and payable of all indebtedness which may arise from said contractor to a subcontractor or party performing labor or furnishing materials, or any subcontractor to any person, firm or corporation on account of any labor performed or materials furnished in the erection, repairing or ornamentation of such building, improvement or works: *Provided, however,* That the principal contractor shall not be required to make any payment to a subcontractor of sums due from the subcontractor to parties performing labor or furnishing materials except upon the receipt of the written orders of such parties to pay the sums due to them to subcontractors. Such bond shall be deposited with and held by such board of officers or agents for the use of any party interested therein.

§3, Act 187 of 1905, C. L. 1915 (14829), How. 2nd Ed. §13841; see C. L. 1897 (10744). This section previous to revision of 1905 was as follows: "Such bond shall be executed by such contractor to the people of the state of Michigan, in such amount, and with such sureties as shall be approved by the board, officer, or agent acting on behalf of the state, county, city, village, township, or school district as aforesaid, and conditioned for the payment by such contractor, or any subcontractor, as the same may become due and payable, of all indebtedness which may accrue to any person, firm, or corporation, on account of any labor performed, or materials furnished in the erection, repairing, or ornamenting of such building or works. Such bond shall be deposited with, and held by, such board officer or agent, for the use of any party interested therein." (Act 94 of 1883; C. L. 1897 §10744). See note to §136 ante. See Forms No. 13 and 16 in Part III.

§ 139. Recovery on Bond—Defenses—Costs.

Such bond may be prosecuted and a recovery had by any person, firm or corporation to whom any money shall be due and payable on account of having performed any labor or furnished any materials in the erection, repairing or ornamentation of any such building or works, in the name of the people of this State for the use and benefit of such person, firm or corporation: *Provided, however,* That in the case of a suit for the benefit of a subcontractor, he shall be required to allege and prove that he has paid to all parties entitled thereto the full sums due to them for labor or materials contracted for by him; And *Provided further,* That in no case brought under the provisions of this act shall the people of this State be liable for costs.

§4, Act 187 of 1905, C. L. 1915 (14830), How. 2nd Ed. §13842; see C. L. 1897 (10745). See note to §136, ante. This section (139) as existing before revision in 1905 was as follows: "Such bond may be prosecuted, and recovery had, by any person, firm, or corporation, to whom any money shall be due and payable, on account of having performed any labor, or furnished any materials in the erection, repairing, or ornamenting of such building or works, in the name of the people of this state, for the use and benefit of such person, firm, or corporation: Provided, that the people of this state shall, in no case brought under the provisions of this act, be liable for costs." (Act 94 of 1883, [C. L. 1897, (10745).] See Form No. 14 in Part III.

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No. 1. Notice of Furnishing Labor or Material or Both.

See C. L. '15, (14796).

To.....:

Take notice that the undersigned is furnishing to .....certain labor (*or* material *or both*) for building (*or* altering, improving, repairing, erecting *or* ornamenting, *as the case may be*) a certain.....situated on (*or* around *or* in front of) the following described property:.....

Dated at....., Michigan, this.....day of....., 19.....

.....

No. 2. Statement by Contractor.

See § 41; C. L. '15, (14799).

STATE OF MICHIGAN,
COUNTY OF ——. } ss.

A. B., being duly sworn, deposes and says that he is (*if making statement as agent:* the agent of C. D., the original contractor herein and makes this affidavit in his behalf; that said C. D., is) the original contractor for the .....(*state nature of work as*: building, altering, improving, repairing, erecting *or* ornamenting) of the .....(*describe structure or improvement as:* house, building, machinery, wharf) situated on the following described property:.....; that the following is a statement of the number and names of every subcontractor and laborer in the employ of this deponent (*or if making statement as agent:* said C. D.,) in connection with said .....(*state nature of work as above*), and of every person furnishing materials therefor; that the amounts due or to become due to such subcontractors, laborers and materialmen for work done and materials furnished at and to the date hereof, is correctly and fully set forth herein opposite their names respectively, as follows:

No.	Name	Labor or materials	Amount
....	.....	.....	.....

Deponent further says that he (*or* said C. D.), has not employed, or procured material from or subcontracted with any person or persons other than those above mentioned, and that he owes no moneys for labor upon or material for the.....(*describe nature of work*) of said..... (*describe structure or improvement*) other than the sums above set forth, and that no other person, firm or corporation furnished any labor or material for this deponent (*or* said C. D.,) or for his benefit or for any person for him in connection with the above work.

A. B.....

Subscribed and sworn to before me this .....day of....., 19....
.....
Notary Public, ...County, Michigan.
My commission expires....., 19....

No. 3. Statement of Lien, by Principal.

See §51; C. L. '15, (14800).

STATE OF MICHIGAN,
COUNTY OF ——. } ss.

A. B. of.....being duly sworn, says that he furnished certain labor (*or* material *or both*) in and for building (*or* altering, improving, repairing, erecting, *or* ornamenting, *as may be*) a certain two story frame house (*or other description as may be*) situated on the lands hereinafter described, in pursuance of a certain contract with C. D., the owner (*or* part owner *or* lessee, contractor *or* subcontractor, *as may be*); that the performance of said labor (*or* the furnishing of said material) was begun on the .....day of....., 19...., and that the last of such labor was performed (*or* material was furnished) on the.....day of....., 19...., and that there is justly and truly due to deponent therefor from the said C. D., over and above all legal setoffs, the sum of $....., for which amount deponent claims a lien on said premises (*or* building *or* both) of which..... is the owner (*or* part owner *or* lessee *as may be*), which premises are described as follows:.....

A..... B.....

Subscribed, etc.

No. 4. Statement of Lien by Agent or Partner.

See § 51; C. L. '15, (14800).

STATE OF MICHIGAN, } ss.
COUNTY OF ——. }

E. F. of.....being duly sworn, says that he is the agent (*if member of partnership makes statement, insert:* a member of the firm of A. and B.) of A. B. of..... Michigan, and is authorized to make this statement in... h... (*or* its) behalf; that said A. B. (*or* firm) furnished certain labor (*or* material *or both*) in and for building (*or* repairing *as may be*) a certain house (*or other improvement, as may be*) situated on the land hereinafter described, in pursuance of a certain contract with C. D. the owner (*or* part owner *or* lessee, contractor *or* subcontractor *as may be*); that the performance of said labor (*or* the furnishing of said material) was begun on the.....day of ....., 19...., and that the last of such labor was performed (*or* material was furnished) on the..... day of....., 19...., and that there is justly and truly due to said A. B. (*or* firm) therefor from the said C. D. over and above all legal setoffs, the sum of $....., for which amount said A. B. (*or* firm) claims a lien on said premises (*or* building) of which.....is the owner (*or* part owner *or* lessee *as may be*), which premises are described as follows:.....

E..... F.....
(or A. and B.
By E..... F.....)

Subscribed, etc.

No. 5. Proof of Service of Statement of Lien.

C. L. '15, (14801).

STATE OF MICHIGAN,
COUNTY OF ——. } ss.

A. B., of....., in said county, being duly sworn, says that on the.....day of....., 19..., at.....in said county, he served a true copy of a Statement of Account and Lien (which statement had been duly filed in the office of the Register of Deeds of said County on the.....day of....., 19...., and of which statement a true copy is hereto annexed) on C. D. the owner (*or* part owner *or* lessee) by handing the same to him personally at his residence (*or* elsewhere *as* may be) in.....in said county.[1]

.....

Subscribed, etc.

No. 6. Bond by Owner to Discharge Lien.

KNOW ALL MEN BY THESE PRESENTS, That we ..... as principal and ..... and ..... as sureties, all of the ..... of ..... County of ....., Michigan, are held and firmly bound unto ..... in the sum of ..... dollars lawful money of the United States of America, to be paid to the said ..... or to ..... cer-

1. If service was made upon the agent in charge of the premises, in the owner's absence, insert: By handing the same in person to ....., agent of said C. D. in charge of said premises, at his residence (*or otherwise*) in ..... in said county, deponent being unable to find said C. D. within said county, said C. D. being absent therefrom, as deponent is informed and believes. If service was made by posting, in the absence of the owner and his agent in charge of the premises, insert: by posting the same on the front of said ..... (*describe structure or improvement*) on said premises, that being a conspicuous place on said premises, deponent being unable, within the period of ten days following the filing of said statement, to find either said C. D. or his agent in charge of said premises within said county.

tain attorneys, heirs, executors, administrators or assigns ..... to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, and each and every of them, firmly by these presents.

Sealed with our seals, dated this ..... day of ..... A. D. 19....

Whereas, the said ..... heretofore, to-wit: on the ..... day of ..... A. D. 19.... filed in the office of the Register of Deeds for the County of ..... state of Michigan, a statement of account, verified by affidavit, of a demand which ..... claimed to be due to ..... and for which..... claimed a lien upon the following described property, to-wit: ..... of which property the above bounden principal is.....;

Now THEREFORE, the condition of this obligation is such, that if the above bounden principal shall pay or cause to be paid to the above named obligee.... any sum of which said obligee.... may obtain judgment or decree upon the demand for which such statement of account was filed, then this obligation to be void, otherwise to remain in full force and virtue.

.....(L.S.)
.....(L.S.)
.....(L.S.)

Signed, sealed and delivered in presence of
.....
.....

STATE OF MICHIGAN, } ss.
COUNTY OF ——. }

..... of the ..... of ..... in said county of ....., one of the sureties named in and who signed the within and foregoing bond, being

duly sworn, deposes and says that he is worth in real estate situated in said county of ..... the sum of ..... dollars, over and above all exemptions, encumbrances, debts and other liabilities.

.....

Subscribed, etc.

No. 7. Certificate of Clerk that Bond is Filed to Discharge Lien.

STATE OF MICHIGAN, } ss.
COUNTY OF ——. }

I, ..., Clerk of the Circuit Court for said County, do hereby certify that on the ..... day of ....., 19...., the ..... of the following described premises ..... as obligor filed, as permitted by law, a good and sufficient bond in the sum of ..... Dollars, to ..... as obligee conditioned for the payment of any sum for which the said obligee.... may obtain judgment or decree upon the demand for which said obligee.... heretofore, to-wit: on the ..... day of ....., 19...., filed a statement of account and lien, claiming therein a lien upon said property; that on the.....day of ..... 19...., I served a notice upon all persons claiming a lien upon said property of the fact of the filing of such bond, stating the amount thereof and naming the sureties thereon as required by law, and that no objections to the sufficiency of the sureties upon such bond have been filed.[2]

Dated this ..... day of ....., 19....

.....Clerk.[3]

---

2. If objections were filed, examination had and the bond thereafter approved, vary the certificate accordingly.

3. The statute provides that the filing of this certificate in the office of the register of deeds will operate to discharge the lien of the obligee therein named.

No. 8. Affidavit by Owner to obtain Clerk's Certificate for Discharge of Lien.

THE CIRCUIT COURT FOR THE COUNTY OF.....
IN CHANCERY.

STATE OF MICHIGAN, } ss.
COUNTY OF ——. }

..... of the ..... of ..... in said county being duly sworn, says that he is[4] ..... the owner.... of the following described premises situated in ..... said County, to-wit: .....; that on the ..... day of ....., 19...., at ..... o'clock ...M., there was filed with the Register of Deeds in and for said County of ..... the statement of Account and Lien of ..... in which a Lien was claimed in h.... favor, against ..... for the amount of ..... Dollars, upon the above described property, for[5] ..... in accordance with Act 179, of the Session Laws of 1891, of the State of Michigan, as amended.

That no proceedings have been commenced to enforce said Lien, and that the time has elapsed within which proceeding should be commenced to enforce such Lien, and that this affidavit is made pursuant to statute for the purpose of obtaining a Certificate for the discharge of said Lien, as provided by law, and further this deponent says not.

.....

Subscribed, etc.

---

4. If party making affidavit is an agent, insert here: The agent of ..... of ..... Michigan, the owner hereinafter mentioned, and is duly authorized to make this affidavit in his behalf; that said ..... is.

5. Insert here a brief statement of what the lien was claimed for, as shown by the statement of lien.

No. 9. Certificate of Clerk Showing non-commencement of Proceedings to Enforce, for Discharge of Lien.

THE CIRCUIT COURT FOR THE COUNTY OF.....

IN CHANCERY.

STATE OF MICHIGAN, } ss.
COUNTY OF ——. }

I, ... Clerk of the Circuit Court for the County of ....., do hereby certify that on the ..... day of ....., 19...., there was presented to me, and duly filed with me, the said Clerk, the affidavit of ..... setting forth that he is[6] ..... the owner.... of the following described premises, situated in the ..... of ..... in said County, to-wit: ..... and that on the ..... day of ....., 19...., at ..... o'clock ...M. there was filed with the Register of Deeds in and for said County of ..... the Statement of Account and Lien of ..... in which a Lien was claimed in his favor against ..... for the amount of ..... Dollars, upon the above described property for[7] ..... in accordance with act 179 of the Session Laws of 1891, of the State of Michigan, as amended; that no proceedings have been commenced to enforce said Lien, and that the time has elapsed within which proceedings should be commenced to enforce such lien, and that said affidavit is made for the purpose of obtaining a certificate for the discharge of said lien as provided by law.

And I, the said Clerk, do further certify that I have made a careful examination and search of the records in my office, and that it appears from such examination that no such

---

6. If party who makes affidavit is an agent, insert here: The agent of ..... of ..... Michigan, the owner hereinafter mentioned; that said ..... is.

7. Insert here a brief statement of what the lien is claimed for, as shown by the statement of lien.

proceedings for the enforcement of said lien have been commenced in said Court.[8]

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court, at ..... in said County, this ..... day of ....., 19....

(Seal.)

.....Clerk.

No. 10. Discharge or Release of Lien.

KNOW ALL MEN BY THESE PRESENTS, that ..... of the ..... of Michigan, do.... hereby certify that the mechanic's lien heretofore filed by ..... on the ..... day of ....., 19...., in the office of the Register of Deeds for the County of ....., Michigan, being Lien Number ..... for $..... against the following described premises, of which premises ..... is the owner, viz: ..... is fully paid, satisfied and discharged.

IN WITNESS WHEREOF, ... have hereunto set ..... hand.. and seal.. the ..... day of ....., 19....

.....(L.S.)

Signed, Sealed and Delivered in Presence of

.....

.....

STATE OF MICHIGAN, } ss.
COUNTY OF ——. }

On this ..... day of ....., 19...., before me, a ..... in and for said County, personally appeared ....., known to me to be the

8. If proceedings have been commenced for enforcement of lien, but not within the time required by law, state when such proceedings were commenced, and that they were not commenced within the year limited by law.

person... named in and who executed the above instrument, and acknowledged it to be..h.. free act and deed, and that ..h.. executed the same for the intents and purposes therein mentioned.

.....

Notary Public ..... County, Michigan.
My commission expires .....

No. 11. Indemnity Bond of Contractor.

KNOW ALL MEN BY THESE PRESENTS, That E. F. of ..... Michigan (hereinafter called the principal), and ..... of ..... Michigan (hereinafter called the surety), are held and firmly bound unto C. D. of ..... Michigan, in the full and just sum of $..... good and lawful money of the United States of America, to the payment of which well and truly to be made, the said principal and the said surety respectively bind themselves, their heirs, executors, administrators, legal representatives (or successors and assigns), firmly by these presents.

The condition of the foregoing obligation is such that, whereas said principal has entered into a certain written contract, a copy of which is hereto attached and made a part hereof, bearing date of ....., 19...., for the erection (*or other improvement as may be*) of a (*describe building or structure*) on the following described premises:.....

Now therefore, if the said principal shall well, truly and faithfully comply with all the terms, covenants and conditions of said contract on said principal's part to be kept and performed according to the tenor thereof, then this obligation is to be null and void, otherwise to be and remain in full force and effect.

Signed, sealed and delivered this ..... day of ....., 19...., at ....., Michigan.

.....(L.S.)
Principal

.....(L.S.)
Surety

(*Attach copy of contract hereto, and add justification by surety, if desired.*)

No. 12. Declaration in Assumpsit on Indemnity Bond of Contractor.

(*Entitle Court and Address.*)

The plaintiff, A. B., respectfully shows:

1. That plaintiff is a resident of .....

2. That on the ..... day of ....., 19...., the defendant, C. D., executed a bond for the payment to the plaintiff of $....., upon which ..... and ..... were sureties.

3. That the condition of the said bond was that if the said C. D., should faithfully comply with all the terms, covenants and conditions of the contract attached to said bond (a copy of which contract is attached hereto, marked "Exhibit A") on the part of said C. D., as principal, to be kept and performed according to the tenor thereof, then said bond should be void, all of which more fully and specifically appears from the said bond, a copy of which is hereto attached, marked "Exhibit B."

4. That the said C. D., did not comply with the terms, covenants and conditions of said contract, but on the ..... day of ....., 19..., ... (*state acts or omissions constituting the breach of the bond and consequent damage to plaintiff therefrom*), whereby the said bond became and is operative and binding.

5. Wherefore said A. B., plaintiff herein, claims a judg-

ment against the said principal C. D., and said sureties for the sum of $.....

.....

.....

Attorney for plaintiff.
(*Business Address.*)

No. 13. Statutory Bond on Public Improvement or Works.[9]

KNOW ALL MEN BY THESE PRESENTS, That ..... of the city of ....., county of ..... and State of ..... as principal, and ..... of the city of ..... county of ..... Michigan, a corporation created and existing under the laws of the State of Michigan, as surety, are held and firmly bound unto the people of the State of Michigan, in the penal sum of $....., to be levied of our property, goods and chattels in case default is made in the condition following:

Whereas, the said principal ..... has executed and entered into a certain contract with the *Board of Education* of the *City of Grand Rapids,* County of *Kent* and State of Michigan, dated the ..... day of ....., 19...., to furnish all the labor and material necessary for the construction of ..... in said contract described.

Now therefore, the condition of this obligation is such that if said ....., principal, shall cause to be made

" * * the payment by such contractor to any subcontractor, or by any such contractor or subcontractor as the same may become due and payable of all indebtedness which may arise from said contractor to a subcontractor or party performing labor or furnishing materials, or any subcontractor to any person, firm or corporation on account of any labor performed or materials furnished in the erection, repairing or ornamentation of such building, improvement or works: (Provided, however, that the principal contractor shall not be required to make any payment to a subcontractor of sums due from

9 Form used by Board of Education of Grand Rapids, Michigan.

the subcontractor to parties performing labor or furnishing materials, except upon the receipt of the written orders of such parties to pay the sums due to them to subcontractors)."

then this obligation to be void, otherwise of full force and virtue.

It is Moreover Understood and Agreed that the said surety hereby expressly waives whatever right it may have to be notified of any such alterations, modifications and additions which may hereafter be agreed upon by the parties to said contract, and also waives whatever right it may have to be notified of or to consent to any extension of time for the performance of the contract which may be agreed upon between the parties to the contract, and acknowledges itself to be bound for all such alterations, modifications and additions and extensions, as fully as though proper notice thereof had been given to it and it had consented thereto; provided always that the total cost of such alterations, modifications and additions shall not exceed 10 per cent. of amount of contract over and above the contract price mentioned in said contract or that the total extension of time granted shall not exceed 20 per cent of the full time allowed for the performance of the contract under the original agreement.

In Testimony Whereof, the said principal has hereunto set his hand and seal, and the said surety has caused these presents to be sealed with its corporate seal, duly attested by the signature of its ..... president and its .....secretary, this .....day of ..... 19....

Signed, Sealed and Delivered in the Presence of .....(L. S.)
....(L. S.)
....(L. S.)

No. 14. Declaration in Assumpsit on Statutory Bond on Public Works.

See C. L. '15, (14830).

(*Entitle Court and Address.*)

The people of the State of Michigan, suing at the relation and for the use of A. B., Plaintiff, by ....., his attorney, respectfully show:

1. That said A. B., is a resident of .....
2. That on the ..... day of .....

19...., the defendant C. D., executed a bond for the payment of $..... to the People of the State of Michigan, upon which ..... and ..... were sureties.

3. That the condition of the said bond was that if said C. D., should cause to be made

"The payment by such contractor to any subcontractor, or by any such contractor or subcontractor as the same may become due and payable of all indebtedness which may arise from said contractor to a subcontractor or party performing labor or furnishing materials, or any subcontractor to any person, firm or corporation on account of any labor performed or materials furnished in the erection, repairing or ornamentation of such building, improvement or works: (Provided, however, that the principal contractor shall not be required to make any payment to a subcontractor of sums due from the subcontractor to parties performing labor or furnishing materials, except upon the receipt of the written orders of such parties to pay the sums due to them to subcontractors),"

the said bond should be void; all of which more fully and specifically appears from the said bond, a copy of which is hereto attached.

That the said C. D., did not perform the condition of said bond as aforesaid, but on the ..... day of ....., 19...., ... (*state acts or omissions constituting breach of bond*), whereby the said bond became and is operative and binding.

5. That said A. B., performed certain labor (*or* furnished certain material) to-wit: ....., in the erection (*or* repairing *or* ornamentation) of said building (*or* work), performing the first of said labor (*or* furnishing the first of said material) on the ..... day of ....., 19...., and the last thereof on the ..... day of ....., 19....; that the reasonable value of said labor so performed (*or* said material so furnished) was the sum of $....., the entire amount of which is still unpaid and due to said plaintiff on account of having performed said labor (*or* having furnished said material.)

6. Wherefore plaintiff claims damage in the sum of

$..... and claims a judgment for the same against said principal and said sureties.

.....
Attorney for Plaintiff.
(*Business Address.*)

No. 15. Notice by Subcontractor to Board of Officers or Agents, on Public Works.

To.....:

(*State title of officers or agents.*)

Take Notice that the undersigned is a subcontractor for the ..... work on the ..... (*describe structure or improvement*), a public building (*or* work) being constructed (*or* repaired *or* ornamented, *as may be*) under contract with you have on behalf of ..... (*name the county, city, village, township or school district for which the building or work is being built, repaired or ornamented*) on the following described premises: .....; and said undersigned is relying upon the security of the bond required to be given by the principal contractor on said public building (*or* work) in accordance with Act 187 of 1905.

.....[10]

10. After giving the above notice to said board of officers or agents, the subcontractor should also notify the principal contractor that he has done so, "and whenever this shall have been done, the said subcontractor shall be entitled, subject to the rights of the persons with whom he has contracted for labor and materials, to the benefit of the security given by the principal contractor, and to be subrogated to the liens of the persons who have performed labor or furnished materials for such building, repairs or ornamentation, whom he shall have actually paid." (Sec. 2 of Act 187 of 1905, C. L. 1915, Sec. 14828).

No. 16. Order for Payment of Laborer or Materialman, upon Principal Contractor.

See C. L. '15, (14826.)

To.....:

Principal Contractor upon (*name public work*).

Please pay the sum of $..... due to me for ..... on the above work to ....., subcontractor.

.....[11]

No. 17. Assignment of Lien or Claim.

Be it known that I (*or* we) ..... of ..... Michigan, for and in consideration of the sum of $....., the receipt whereof is hereby acknowledged, do hereby sell, assign, and transfer to..... of ....., Michigan, all my (*or* our) right, title and interest in and to my (*or* our) lien (*or* claim of lien) in the sum of $..... and interest, against the premises named in the attached copy of statement of lien, and the debt secured by such lien, for labor performed (or material furnished *or both*) on the building (*or other work as may be*) of the house (*or other structure or improvement*) on said premises; giving and granting unto said ..... full power to collect said debt and enforce said lien by appropriate proceedings, the same as I (*or* we) might do myself (*or* ourselves.)

In Testimony Whereof, I (*or* we), have hereunto set ..... hand .... and seal .... at ....., Michigan, this ..... day of ....., 19...

.....(L.S.)

---

11. The statute (C. L. 1915, §14829) provides that "the principal contractor shall not be required to make any payment to a subcontractor of sums due from the subcontractor to parties performing labor or furnishing materials, except upon the receipt of the written orders of such parties" as above.

Signed, Sealed and Delivered in the Presence of

.....

.....

(*Add acknowledgment.*)

No. 18. Bill by Contractor to Foreclose Mechanics' Lien on Land and Building.

(*Entitle court, cause and address.*)

The Plaintiff, E. F., respectfully shows:

1. That plaintiff is a resident of ..... and is engaged in the business of ..... in .....

2. That heretofore, to-wit, on the ..... day of ....., 19...., one C. D., being the owner (*or such interest in the property as may appear in the particular case*) of the following described lands.....entered into a certain contract (*if in writing, say so*) with plaintiff wherein it was agreed between plaintiff and said C. D. that for and in consideration of the sum of $..... to be paid by said C. D. to plaintiff, the plaintiff would build and erect (*or such other description of work to be performed as is appropriate*) on the said land a certain..... .....in the following manner: (*state terms of contract including time and manner of payment, time of completion, etc., and if in writing add:* a copy of which contract is hereto attached marked "Exhibit A" and made a part of this bill of complaint.)

3. That plaintiff thereafter fully performed his part of said contract and built and erected (*or otherwise to fit the particular case*) the said dwelling house (*or proper description of structure*) in accordance with the terms of said contract within the time limited therein, the same having been completed on the ..... day of ....., 19....

4. That immediately after the completion of the aforesaid building (*insert other appropriate description of struct-*

ure where necessary), to-wit, on the ..... day of ....., 19...., said C. D. accepted the same and took possession thereof (*vary as the facts require.*)

5. That after plaintiff had completely performed said contract and fully and completely built and erected said dwelling house (*vary the form to meet the particular case*), to-wit, on the ..... day of ....., 19...., he gave to the said C. D. a statement under oath pursuant to Section 4 of the Lien Law, stating the things therein required and particularly the number and names of every subcontractor and laborer in his employ and of every person furnishing materials for or in the performance of said contract and showing therein on oath that all said subcontractors, laborers and materialmen had been and were fully paid (*may be varied to meet particular facts.*)

6. That within sixty days after plaintiff had completed the building and erection (*or other work*) of said dwelling house (*or other structure*) and had fully and completely performed his part of said contract and on the ..... day of ....., 19...., plaintiff made and filed in the office of the register of deeds of said county a true and just statement of account of the amount due to him over and above all legal setoffs, duly verified and setting forth all of the requisites, statements and facts required by law, a copy of which statement is hereto attached, marked "Exhibit B" and made a part hereof. (*If lien served on owner, or if contract not directly with owner, show fact and manner of service.*)

7. That by reason thereof a valid and enforcible lien against said premises and in favor of plaintiff arose, and that, although payment for said work (and material, *if both*) has been demanded by plaintiff, neither said lien nor the debt underlying the same has been paid, satisfied, discharged, waived, assigned, terminated or in any manner relinquished (*enlarge or limit to fit the facts*), and that there is now due and owing to plaintiff thereon, over and above all legal set-offs, the sum of $..... and that

for the enforcement of said lien and debt plaintiff is entitled to establish and foreclose said lien pursuant to the statute in such case made and provided.

8. That no suit or proceeding at law has been begun for the recovery of the debt secured by said lien, or any part thereof (*vary to fit the facts.*)

9. That as plaintiff is informed and believes, the following named persons:....., ... and .....have or claim to have liens against said premises, which liens, if valid, are simultaneous with and not superior to the lien of plaintiff. (*If there are superior interests outstanding, as prior mortgages, state same here.*)

10. The plaintiff therefore prays the aid of this court:

a. That the said C. D., ... and ..... (*name the defendant and all persons interested in the premises, including other lienholders and those who have filed notice of their intention to claim liens*), the defendants hereto may, without oath, answer on oath being hereby waived, answer all and singular the matters hereinbefore stated and charged, and that they may come to a just and true account with plaintiff in the premises.

b. That the amount found to be due to plaintiff with interest and costs may be decreed to be a lien upon the aforesaid land and premises in favor of plaintiff.

c. (*If there are other lien claimants*: That the liens of the said ..... and ....., if found to be valid, may be decreed to be simultaneous with and not superior to the lien of plaintiff.)

d. That the said defendant, C. D., be decreed to pay to the plaintiff the amount so found to be due to him with interest and the costs of this suit, forthwith.

e. That in default of such payment the said land and premises with the appurtenances may be sold by and under the direction of this court and the proceeds of such sale be applied to satisfy the amount found to be due to plaintiff with interest and costs of this suit and the expenses of sale.

f. That in the event of such sale the defendant and all persons in privity with him may be forever barred and foreclosed of and from all right or equity of redemption of said land and premises and that they and each and all of them, after the expiration of fifteen months from the time of filing the bill of complaint herein, deliver and yield up possession thereof to the purchaser at such sale on production of the deed of the officer making the same, and a certified copy of the order of this court confirming the report of such sale, after such order has become absolute; unless said lands and premises shall have been in the meantime redeemed according to law.

g. That in the event that said sale shall fail to produce a sufficient sum to pay the entire amount found to be due to the plaintiff, together with interest, costs and the expenses of such sale, the said defendant, C. D., be decreed to pay to the plaintiff the amount of such deficiency, and that plaintiff have a personal decree and execution for the collection thereof.

h. And that plaintiff may have such other and further relief in the premises as shall be just and appropriate.

.....

.....

Attorney for Plaintiff.
(*Business address.*)

STATE OF MICHIGAN, } ss.
COUNTY OF ——. }

E. F., being first duly sworn, deposes and says that he has ..... read the foregoing bill of complaint by him subscribed, and knows the contents thereof, and that the same is true except as to the matters therein stated to be on his information and belief, and that as to such matters he believes it to be true.

.....

Subscribed and sworn to before me
this ..... day of ....., 19....
.....
Notary Public, ...County, Michigan
My commission expires ....., 19...

No. 19. Bill by Contractor to Foreclose Mechanics' Lien on New Structure Only.

(*Entitle court, cause and address.*)

The plaintiff, E. F., respectfully shows:

1. That plaintiff is a resident of ..... and is engaged in the business of ..... in .....

2. That heretofore, to-wit, on ..... and prior thereto, one Y. Z. was the owner of the following described premises: .....; and that on ..... day of ..... one C. D. entered into a certain contract (*if in writing say so*) with the plaintiff wherein it was agreed between the plaintiff and said C. D. that for and in consideration of the sum of $..... to be paid by said C. D. to plaintiff, the plaintiff would build and erect on the said land a certain (*insert description of structure*) in the following manner: (*state terms of contract including time and manner of payment, time of completion, etc., and if in writing add:* a copy of which contract is hereto attached marked "Exhibit A" and made a part of this bill of complaint.)

3. That the plaintiff thereafter fully performed his part of said contract and built and erected the said dwelling house (*or proper description of structure*) in accordance with the terms of said contract within the time limited therein, the same having been completed on the ..... day of .....19....

4. That the fair and reasonable value of the labor and material so furnished by plaintiff and used in the construction of said building was the sum of $.....

5. That immediately after the completion of the afore-

said building (*insert other appropriate description of structure where necessary*), to-wit, on the ..... day of ....., 19...., said C. D. accepted and took possession of the same. (*Vary as the facts require.*)

6. That after plaintiff had completely performed said contract and fully and completely built and erected said dwelling house (*or other new structure, as may be*) plaintiff first learned that said C. D. was not at the time the owner of said land upon which said building (*or* structure) was being erected, but that said Y. Z. was during said time the owner of said land (*vary to fit the facts, stating facts fully to show real situation and extent of interest or want of interest of defendant C. D. in the land or premises, and the occasion of his contract for and erection of structure upon land not belonging to him.*)

7. That thereafter, to-wit, on the ..... day of ....., 19...., plaintiff gave to the said C. D. and Y. Z. respectively a statement under oath pursuant to section 4 of the Lien Law, stating the things therein required and particularly the number and names of every subcontractor and laborer in his employ and of every person furnishing materials for or in the performance of said contract and showing therein on oath that all said subcontractors, laborers and materialmen had been and were fully paid. (*Vary to meet particular facts.*)

8. That within sixty days after plaintiff had completed the building and erection of said dwelling house (*or other structure*) and had fully and completely performed his part of said contract, and on the ..... day of ..... 19...., plaintiff made and filed in the office of the register of deeds of said county a just and true statement of account of the amount due to him over and above all legal setoffs, duly verified and setting forth all of the requisites, statements and facts required by law, a copy of which statement is hereto attached marked "Exhibit B" and made a part hereof. (*It would be well to make and show service of the lien claim upon both the owner of the land and the owner of the building.*)

9. That by reason thereof a valid and enforcible lien against said building and in favor of plaintiff arose, and that, although payment for said work and material has been demanded by plaintiff, neither said lien nor the debt underlying the same has been paid, satisfied, discharged, waived, assigned, terminated or in any manner relinquished (*enlarge or limit to fit the facts*), and that there is now due and owing to plaintiff thereon, over and above all legal setoffs, the sum of $..... with interest thereon since the..... day of ....., 19...., and that for the enforcement of said lien and debt plaintiff is entitled to establish and foreclose said lien pursuant to the statute in such case made and provided.

10. That no proceedings are pending or have been had at law for the recovery of the debt secured by said lien, or any part thereof. (*Vary to fit the facts.*)

11. That, as the plaintiff is informed and believes, the following named persons ..... and....., have or claim to have some right or interest in said structure (*insert a particular statement of interests, being particular about those of other lienors and claimants of interests which may be superior to or concurrent with those of the plaintiff*); that the plaintiff avers that except as stated above, all such rights and interests are subject to the aforesaid lien of plaintiff.

12. The plaintiff therefore prays the aid of this court:

a. That the said C. D. and Y. Z. (*name the defendant and all persons interested in the premises, including other lienholders and those who have filed notice of their intention to claim liens*), the defendants hereto may, without oath, answer on oath being hereby waived, answer all and singular the matters hereinbefore stated and charged, and that they may come to a just and true account with plaintiff in the premises.

b. That the amount found to be due to plaintiff with interest and costs may be decreed to be a lien upon the aforesaid building (*or* structure) in favor of plaintiff,

c. That said defendant, C. D., be decreed to pay to plaintiff the amount so found to be due to him, with interest and the costs of this suit, forthwith.

d. That in default of such payment the said building (*or* structure) may be sold by and under the direction of this court separately, and to be removed, from the land on which the same is situated, and that the proceeds of such sale be applied to satisfy the amount due to plaintiff with interest and costs of this suit and the expenses of such sale.

e. That, in the event that the sale of said building (*or* structure) shall fail to produce a sufficient sum to pay the whole amount so found to be due to plaintiff as aforesaid, together with interest and the costs of this suit and the expenses of such sale, said defendant, C. D., be decreed to pay to plaintiff the amount of such deficiency, and that plaintiff have a personal decree and execution for the collection thereof.

f. And that plaintiff may have such other and further relief in the premises as shall be just and appropriate.

.....

.....

Attorney for Plaintiff
(*Business address*)

(*Add proper verification.*)

No. 20. Bill by Subcontractor.

(*Entitle court, cause and address.*)

That plaintiff A. B. respectfully shows:

1. That plaintiff is a resident of.....and is engaged in the business of ..... in .....

2. That heretofore, to-wit, on the .....day of .....19...., one C. D. was the owner in fee simple (*or* part owner *or* lessee, *etc.*) of that certain piece or parcel of land described as follows: ..... and being such owner (*or* part owner, *etc.*) the said C. D. did then make a certain contract and agreement with one

E. F. wherein and whereby it was agreed that the said E. F. should build and construct (*or otherwise to fit the case*) for the said C. D. on the said land a certain (*describe the building, and state the terms of the contract including consideration and terms of payment as fully as known.*)

3. That thereafter, to-wit, on or about the..... day of ....., 19...., the said E. F. entered upon and commenced the building and construction (*or otherwise to fit the case*) of the said ..... upon the said land pursuant to his said contract and agreement, and in that behalf the said E. F. did afterwards, to-wit, on or about the .....day of ....., 19...., make a subcontract and agreement with plaintiff wherein and whereby it was agreed that plaintiff should do and perform the carpenter (*or* mason *or as it may be*) work in and about the building and construction (*or otherwise as it may be*) of the said ....., for the consideration and compensation of (*state terms of subcontract and amount and terms of payment fully; and if subcontract was in writing add*) a copy of which subcontract is hereto attached marked "Exhibit A" and made a part of this bill of complaint).

4. That in pursuance thereof plaintiff performed said work, performing the first of the same on the ..... day of ....., 19...., and the last of the same on the.....day of ..... when said subcontract was fully performed by plaintiff according to its terms; that said work was duly accepted by said C. D. and said E. F., and that the fair and reasonable value thereoof was the aforesaid sum of $.....; (*if materials were also furnished, vary this and subsequent paragraphs accordingly.*)

5. That within thirty days after performing the first of said work and labor, to-wit, on the .....day of....., 19...., plaintiff served upon the said C. D. personally (*or* upon G. H. the agent of the said C. D. having charge of said premises, the said C. D. being absent from said county) a written notice of the furnishing of

said work (*or* material *or both*), a copy of which notice is hereto attached, marked "Exhibit B" and made a part hereof. (*Omit or vary, to fit the facts*).

6. That afterwards and within sixty days after the performance of the last of the said work and labor, to-wit, on the ..... day of ....., 19...., plaintiff made and filed in the office of the register of deeds of said county, a just and true statement of account of the amount due to him, over and above all legal setoffs, duly verified and seting forth all of the requisites, statements and facts required by law, a copy of which statement is hereto attached, marked "Exhibit C" and made a part hereof.

7. That within ten days thereafter, to-wit, on the.... .....day of ....., 19...., plaintiff served upon the said C. D. within said county (*or* upon G. H. agent of the said C. D., having in charge the said premises, within said county, the said C. D. being then absent from said county) a copy of said statement, and afterwards, to-wit, on the ..... day of....., 19...., plaintiff filed in the office of the register of deeds of said county proof of such service by affidavit, a copy of which proof of service is hereto attached marked "Exhibit D" and made a part hereof.

(*If neither owner nor agent could be found substitute for paragraph above*:)

7. That during the ten days after filing the said statement as aforesaid, plaintiff made diligent search and inquiry for the said C. D. within said county, and that the said C. D. could not be found in said county, and that plaintiff also during the said ten days made diligent search and inquiry for an agent of said C. D. having charge of said premises within said county, and that no agent of said C. D. could be found in said county; and thereupon plaintiff within five days after the lapse of the said ten days, and to-wit, on the ..... day of ....., 19...., served such copy by posting the same in a conspicuous place, (*state whereabouts*) on said premises, and afterwards, to-wit, on

the ..... day of ....., 19...., plaintiff filed in the office of the register of deeds of said county proof of such service by affidavit, a copy of which proof of service is hereto attached, marked "Exhibit D," and made a part hereof.

8. That plaintiff is informed and believes that said E. F. has never at any time made out or given to said C. D., or to any agent of said C. D., any statement under oath of the number and names of every or any subcontractor or laborer in his employ in or about the building and construction (*or otherwise as may be*) of the said ....., or of every or any person furnishing materials for the same, giving the amount due or to become due to them, or any of them, for work done or material furnished; but that said C. D. has made certain payments to said E. F. without demanding or requiring of or from said E. F. said sworn statement. (*Vary to fit the facts; if sworn statement was made and furnished, but payments were not distributed in accordance with statement, and the facts in that regard become material, state them fully.*)

9. That by reason thereof a valid and enforcible lien against said premises and in favor of plaintiff arose, and that, although payment for said work (and material) has been demanded by plaintiff, neither said lien nor the debt underlying the same has been paid, satisfied, discharged, waived, assigned, terminated or in any manner relinquished (*enlarge or limit to fit the facts*), and that there is now due and owing to plaintiff thereon, over and above all legal set-offs, the sum of $....., and that for the enforcement of said lien and debt plaintiff is entitled to establish and foreclose said lien pursuant to the statute in such case made and provided.

10. And that plaintiff is informed and believes that ..... and.....have, or claim to have, liens against said premises which liens, if valid, are simultaneous with and not superior to the lien of plaintiff. (*If there are superior interests outstanding, as prior mortgages, state same here*).

11. The plaintiff therefore prays the aid of this court:

a. That the said owner C. D. and the said contractor E. F., (and ....., ... and....., *naming all persons having rights or interests in the premises, including other lienholders and those who have filed notice of their intention to claim liens*), the defendants hereto may, without oath, answer upon oath being hereby waived, answer all and singular the matters hereinbefore stated and charged, and that they may come to a just and true account with plaintiff in the premises.

b. That the amount found to be due to plaintiff upon such accounting with interest and costs, may be decreed to be a lien upon the land and premises aforesaid in favor of plaintiff.

c. That the said defendant, C. D. (and E. F.) be decreed to pay the plaintiff the amount so found to be due to him, with interest and the costs of this suit, forthwith.

d. That in default of such payment the said land and premises with the appurtenances may be sold by and under the direction of this court, and the proceeds of such sale be applied to satisfy the amount so found to be due to plaintiff, with interest and the costs of this suit, and the expenses of such sale.

e. That, in the event of such sale, the said defendant, C. D., and all persons claiming by, through or under him, or who have come into possession of said premises since the commencement of this suit, may be forever barred and foreclosed of and from all right or equity of redemption of the said land and premises, and that they, each, and all of them, after the expiration of fifteen months from the time of filing the bill of complaint herein, deliver and yield up possession thereof to the purchaser thereof at such sale on production of the deed executed by the officer making such sale, and a certified copy of the order of this court, confirming the report of such sale after such order has become absolute; unless said land and premises shall have been in the meantime redeemed according to law.

f. That in the event that the sale of said land and premises shall fail to produce a sufficient sum to pay the whole amount so found to be due to plaintiff as aforesaid, together with interest and the costs of this suit and the expenses of such sale, the defendant C. D. (*or such others as may be personally liable*) be decreed to pay to plaintiff the amount of such deficiency, and that plaintiff have a personal decree and execution for the collection thereof.

And that plaintiff may have such other and further relief in the premises as shall be just and appropriate.

.....

.....

Attorney for Plaintiff.

(*Business Address*).

(*Add proper verification*).

No. 21. Bill by Laborer.

(*Entitle court, cause and address.*)

That plaintiff A. B., respectfully shows:

1. That plaintiff is a resident of..... and is engaged in the business of..... in .....

2. That heretofore, to-wit, on the .....day of ....., 19...., one C. D. was the owner in fee simple (*or* part owner *or* lessee, *etc.*) of that certain piece or parcel of land described as follows:..... and being such owner (*or* part owner, *etc.*) the said C. D. did then make a certain contract and agreement with one E. F. wherein and whereby it was agreed that the said E. F. should build and construct (*or otherwise to fit the case*) for the said C. D. on the said land a certain (*describe the building, and state the terms of the contract including consideration and terms of payment as fully as known.*)

3. That thereafter, to-wit, on or about the..... day of ..... 19...., the said E. F. entered upon

and commenced the building and construction (*or otherwise to fit the case*) of the said..... upon the said land pursuant to his said contract and agreement, and in that behalf the said E. F. did afterwards, to-wit, on or about the ..... day of ....., 19...., enter into a contract with plaintiff wherein and whereby plaintiff was to perform certain labor, to-wit:....., in and for the building and construction (*or otherwise as may be*) of the said....., for the consideration and compensation of ..... payable as follows:..... (*state terms of contract fully, and if it was in writing add:* a copy of which contract is attached hereto, marked "Exhibit A" and made a part of this bill of complaint). (*If contract with subcontractor, vary to fit facts.*)

4. That in pursuance thereof plaintiff performed said work, performing the first of the same on the..... day of ....., 19...., and the last of the same on .....day of ....., 19...., when said contract and work was fully performed by plaintiff according to its terms; that said work was duly accepted by said C. D., and said E. F. (*or name subcontractor as may be*), and that the fair and reasonable value thereof was the aforesaid sum of $.....

5. That within thirty days after performing the first of said work and labor, to-wit: on the.....day of ....., 19...., plaintiff served upon the said C. D. personally (*or* upon G. H. the agent of the said C. D. having charge of said premises, the said C. D. being absent from said county) a written notice of the furnishing of said work, a copy of which notice is hereto attached, marked "Exhibit B" and made a part hereof. (*Omit or vary, to fit the facts*).

6. That afterwards and within sixty days after the performance of the last of the said work and labor, to-wit: on the.....day of....., 19...., plaintiff made and filed in the office of the register of deeds of said county, a just and true statement of account of the amount due to him, over and above all legal setoffs, duly verified and set-

ting forth all of the requisites, statements and facts required by law, a copy of which statement is hereto attached, marked "Exhibit C" and made a part hereof.

7. That within ten days thereafter, to-wit, on the..... .....day of....., 19...., plaintiff served upon the said C. D. within said County (*or* upon G. H., agent of the said C. D., having in charge the said premises, within said county, the said C. D. being then absent from said county) a copy of said statement, and afterwards, to-wit, on the ..... day of ....., 19...., plaintiff filed in the office of the register of deeds of said county proof of such service by affidavit, a copy of which proof of service is hereto attached marked "Exhibit D" and made a part hereof.

(*If neither owner nor agent could be found substitute for paragraph above:*)

7. That during the ten days after filing the said statement as aforesaid, plaintiff made diligent search and inquiry for the said C. D. within said county, and that the said C. D. could not be found in said county, and that plaintiff also during the said ten days made diligent search and inquiry for an agent of said C. D. having charge of said premises within said county, and that no agent of said C. D. could be found in said county; and thereupon plaintiff within five days after the lapse of the said ten days, and to-wit, on the ..... day of ....., 19...., served such copy by posting the same in a conspicuous place, (*state whereabouts*) on said premises, and afterwards, to-wit, on the ..... day of ....., 19...., plaintiff filed in the office of the register of deeds of said county proof of such service by affidavit, a copy of which proof of service is hereto attached, marked "Exhibit D," and made a part hereof.

8. That plaintiff is informed and believes that said E. F. has never at any time made out or given to said C. D., or to any agent of said C. D., any statement under oath of the number and names of every or any subcontractor or

laborer in his employ in or about the building and construction (*or otherwise as may be*) of the said....., or of every or any person furnishing materials for the same, giving the amount due or to become due to them, or any of them, for work done or material furnished; but that said C. D. has made certain payments to said E. F. without demanding or requiring of or from said E. F. said sworn statement. (*Vary to fit the facts; if sworn statement was made and furnished, but payments were not distributed in accordance with statement, and the facts in that regard become material, state them fully.*)

9. That by reason thereof a valid and enforcible lien against said premises and in favor of plaintiff arose, and that, although payment for said work (and material) has been demanded by plaintiff, neither said lien nor the debt underlying the same has been paid, satisfied, discharged, waived, assigned, terminated or in any manner relinquished (*enlarge or limit to fit the facts*), and that there is now due and owing to the plaintiff thereon, over and above all legal setoffs, the sum of $....., and that for the enforcement of said lien and debt plaintiff is entitled to establish and foreclose said lien pursuant to the statute in such case made and provided.

10. And that plaintiff is informed and believes that ..... and ..... have, or claim to have, liens against said premises which liens, if valid, are simultaneous with and not superior to the lien of plaintiff. (*If there are superior interests outstanding, as prior mortgages, state same here*).

11. The plaintiff therefore prays the aid of this court:

a. That the said owner C. D. and the said contractor E. F., (and....., ...and ....., *naming all the persons having rights or interests in the premises, including other lienholders and those who have filed notice of their intention to claim liens*), and defendants hereto may, without oath, (answer upon oath being hereby waived) answer all and singular the matters here-

inbefore stated and charged, and that they may come to a just and true account with plaintiff in the premises.

b. That the amount found to be due to the plaintiff upon such accounting with interest and costs, may be decreed to be a lien upon the land and premises aforesaid in favor of plaintiff.

c. (*If there are other lien claimants:* That the liens of the said ..... and ....., if found to be valid, may be decreed to be simultaneous with and not superior to the lien of plaintiff.)

d. That the said defendant, C. D. (and E. F.) be decreed to pay the plaintiff the amount so found to be due to him, with interest and the costs of this suit, forthwith.

e. That in default of such payment the said land and premises with the appurtenances may be sold by and under the direction of this court, and the proceeds of such sale be applied to satisfy the amount so found to be due to plaintiff, with interest and the costs of this suit, and the expenses of such sale.

f. That, in the event of such sale, the said defendant, C. D., and all persons claiming by, through or under him, or who have come into possession of said premises since the commencement of this suit, may be forever barred and foreclosed of and from all right or equity of redemption of the said land and premises, and that they, each, and all of them, after the expiration of fifteen months from the time of filing the bill of complaint herein, deliver and yield up possession thereof to the purchaser thereof at such sale on production of the deed executed by the officer making such sale, and a certified copy of the order of this court, confirming the report of such sale after such order has become absolute; unless said land and premises shall have been in the meantime redeemed according to law.

g. That in the event that the sale of said land and premises shall fail to produce a sufficient sum to pay the whole amount so found to be due to plaintiff as aforesaid, together with interest and the costs of this suit and the expenses of

such sale, the defendant C. D. (*or such others as may be personally liable*) be decreed to pay to plaintiff the amount of such deficiency, and that plaintiff have a personal decree and execution for the collection thereof.

And that plaintiff may have such other and further relief in the premises as shall be just and appropriate.

.....

.....

Attorney for Plaintiff.
(*Business Address.*)
(*Add proper verification.*)

No. 22. Bill by Materialman.

(*Entitle court, cause and address.*)

That plaintiff A. B. respectfully shows:

1. That plaintiff is a resident of ..... and is engaged in the business of..... in .....

2. That heretofore, to-wit, on the .....day of ....., 19...., one C. D. was the owner in fee simple (*or* part owner *or* lessee, *etc.*) of that certain piece or parcel of land described as follows:.....:..... and being such owner (*or* part owner, *etc.*) the said C. D. did then make a certain contract and agreement with one E. F. wherein and whereby it was agreed that the said E. F. should build and construct (*or otherwise to fit the case*) for the said C. D. on the said land a certain (*describe the building, and state the terms of the contract including consideration and terms of payment as fully as known.*)

3. That thereafter, to-wit, on or about the..... day of ....., 19...., the said E. F. entered upon and commenced the building and construction (*or otherwise to fit the case*) of the said .....upon the said land pursuant to his said contract and agreement, and in that behalf the said E. F. did afterwards, to-wit, on or about the ..... day of ....., 19...., enter into a contract with plaintiff wherein and whereby plaintiff was

to furnish certain material, to-wit: ....., in and for the building and construction (*or otherwise as may be*) of the said ....., for the consideration and compensation of ..... payable as follows: ..... (*state terms of contract fully, and if it was in writing add*: a copy of which contract is attached hereto, marked "Exhibit A" and made a part of this bill of complaint. (*If contract with subcontractor, vary to fit facts.*)

4. That in pursuance thereof plaintiff furnished said material, furnishing the first of the same on the..... day of ....., 19...., and the last of the same on the ..... day of ....., 19.., when said contract was fully performed by plaintiff according to its terms; that said material was actually used in said building (*or other work as may be*) and was duly accepted by said C. D. and said E. F. (*or name subcontractor as may be*), and that the fair and reasonable value thereof was the aforesaid sum of $.....

5. That within thirty days after furnishing the first of said material, to-wit, on the ..... day of ....., 19...., plaintiff served upon the said C. D. personally (*or* upon G. H. the agent of the said C. D. having charge of said premises, the said C. D. being absent from said county) a written notice of the furnishing of said material, a copy of which notice is hereto attached, marked "Exhibit B" and made a part hereof. (*Omit or vary, to fit the facts.*)

6. That afterwards and within sixty days after the furnishing of the last of said material, to-wit: on the..... day of ....., 19...., plaintiff made and filed in the office of the register of deeds of said county, a just and true statement of account of the amount due to him, over and above all legal setoffs, duly verified and setting forth all of the requisites, statements and facts required by law, a copy of which statement is hereto attached marked "Exhibit C" and made a part hereof.

7. That within ten days thereafter, to-wit, on the ..... day of ....., 19...., plaintiff

served upon the said C. D. within said county (*or* upon G. H. agent of the said C. D., having in charge the said premises, within said county, the said C. D. being then absent from said county) a copy of said statement, and afterwards, to-wit, on the ..... day of ....., 19...., plaintiff filed in the office of the register of deeds of said county proof of such service by affidavit, a copy of which proof of service is hereto attached marked "Exhibit D" and made a part hereof.

(*If neither owner nor agent could be found substitute for paragraph above:*)

7. That during the ten days after filing the said statement as aforesaid, plaintiff made diligent search and inquiry for the said C. D. within said county, and that the said C. D. could not be found in said county, and that plaintiff also during the said ten days made diligent search and inquiry for an agent of said C. D. having charge of said premises within said county, and that no agent of said C. D. could be found in said county; and thereupon plaintiff within five days after the lapse of the said ten days, and to-wit, on the ..... day of ....., 19...., served such copy by posting the same in a conspicuous place, (*state whereabouts*) on said premises and afterwards, to-wit, on the ..... day of ....., 19...., plaintiff filed in the office of the register of deeds of said county proof of such service by affidavit, a copy of which proof of service is hereto attached, marked "Exhibit D," and made a part hereof.

8. That plaintiff is informed and believes that said E. F. has never at any time made or given to said C. D., or to any agent of said C. D., any statement under oath of the number and names of every or any subcontractor or laborer in his employ in or about the building and construction (*or otherwise as may be*) of the said....., or of every or any person furnishing materials for the same, giving the amount due or to become due to them, or any of them, for work done or material furnished; but that said C. D. has

made certain payments to said E. F. without demanding or requiring of or from said E. F. said sworn statement. (*Vary to fit the facts; if sworn statement was made and furnished, but payments were not distributed in accordance with statement, and the facts in that regard become material, state them fully.*)

9. That by reason thereof a valid and enforcible lien against said premises and in favor of plaintiff arose, and that, although payment for said work (and material) has been demanded by plaintiff, neither said lien nor the debt underlying the same has been paid, satisfied, discharged, waived, assigned, terminated or in any manner relinquished (*enlarge or limit to fit the facts*), and that there is now due and owing to plaintiff thereon, over and above all legal setoffs, the sum of $....., and that for the enforcement of said lien and debt plaintiff is entitled to establish and foreclose said lien pursuant to the statute in such case made and provided.

10. And that plaintiff is informed and believes that ....., ... and ..... have, or claim to have, liens against said premises which liens, if valid, are simultaneous with and not superior to the lien of plaintiff. (*If there are superior interests outstanding, as prior mortgages, state same here*).

11. The plaintiff therefore prays the aid of this court:

a. That the said owner C. D. and the said contractor E. F., (and....., ... and ....., *naming all persons having rights or interests in the premises, including other lienholders and those who have filed notice of their intention to claim liens*), the defendants hereto may, without oath, (answer upon oath being hereby waived) answer all and singular the matters hereinbefore stated and charged, and that they may come to a just and true account with plaintiff in the premises.

b. That the amount found to be due to plaintiff upon such accounting with interest and costs, may be decreed

to be a lien upon the land and premises aforesaid in favor of plaintiff.

c. (*If there are other lien claimants*: That the liens of the said ....., and ....., if found to be valid, may be decreed to be simultaneous with and not superior to the lien of plaintiff.)

d. That the said defendant, C. D. (and E. F.) be decreed to pay the plaintiff the amount so found to be due to him, with interest and the costs of this suit, forthwith.

e. That in default of such payment the said land and premises with the appurtenances may be sold by and under the direction of this court, and the proceeds of such sale be applied to satisfy the amount so found to be due to plaintiff, with interest and the costs of this suit, and the expenses of such sale.

f. That, in the event of such sale, the said defendant, C. D., and all persons claiming by, through or under him, or who have come into possession of said premises since the commencement of this suit, may be forever barred and foreclosed of and from all right or equity of redemption of the said land and premises, and that they, each, and all of them, after the expiration of fifteen months from the time of filing the bill of complaint herein, deliver and yield up possession thereof to the purchaser thereof at such sale on production of the deed executed by the officer making such sale, and a certified copy of the order of this court, confirming the report of such sale after such order has become absolute; unless said land and premises shall have been in the meantime redeemed according to law.

g. That in the event that the sale of said land and premises shall fail to produce a sufficient sum to pay the whole amount so found to be due to plaintiff as aforesaid, together with interest and the costs of this suit and the expenses of such sale, the defendant, C. D. (*or such others as may be personally liable*) be decreed to pay to plaintiff the amount of such deficiency, and that plaintiff have a personal decree and execution for the collection thereof.

And that plaintiff may have such other and further relief in the premises as shall be just and appropriate.

.....

.....

Attorney for Plaintiff.

(*Business Address.*)

(*Add proper verification.*)

No. 23. Bill or Crossbill to Enforce Claim not Due—Averments.

(*Entitle court and cause, and use proper averments from other forms of bills or crossbills.*)

(*In case the claim for which lien has been filed is not due, either because a note extending the time of payment has been taken, or where the contract for construction provided for deferred payment, the statements in paragraphs of the bill and prayer should be varied to fit the facts. Preferably one or more paragraphs of the bill and paragraphs b and d of the prayer may be altered, or may be substituted by or coupled with the following:*)

——. That by reason of the facts herein stated a valid and enforcible lien against the said premises and in favor of the plaintiff arose, and that neither the said lien nor the debt underlying the same has been paid, satisfied, discharged, waived, assigned, terminated or in any manner relinquished (*enlarge or limit to fit the facts*); that the demand of the plaintiff upon which his said claim of lien is based is not yet due but will become due and payable on the .....day of ....., 19...., the maturty of the said demand being postponed until that date by (*state reason why demand not due*); that there is now owing to the plaintiff upon the said demand and claim the sum of $..... over and above all legal setoffs and counterclaims; that the plaintiff files this, his bill (*or* this his crossbill, *or* intervenes) to secure the benefit of the statute, and to take advantage of the security of the lien

which he has given notice of an intention to claim and claimed, for the payment of his debt and demand notwithstanding the same is not yet due.

(b)

That the said claim of the plaintiff together with interest and costs may be allowed subject to a reduction of interest to the time when said claim would become due.

(d)

That the defendant C. D. (*or other person or persons liable*) be decreed to pay to the plaintiff the amount thus allowed as owing him together with interest and the costs of this suit, within a day certain after the maturity of the same to be fixed in said decree.

(*In case the lien claimant is a defendant and files a cross bill or files an intervening bill, proper averments should be included, and the prayer should either request postponement of distribution, or in the event of sale to satisfy other liens, request the withholding of sufficient of the proceeds or claimant's proportion thereof, to liquidate the lien of the claimant when it shall become due.*)

No. 24. Lis Pendens.

(*Entitle Court and Cause.*)

To Whom It May Concern:

Notice is hereby given that the above entitled cause is a suit to enforce a mechanic's lien now pending in said court, wherein plaintiff seeks to establish and foreclose such lien upon the premises owned by defendant C. D. (*or state fact as it is if ownership otherwise*) known and described as follows: .....

.....

Attorney for Plaintiff.

Dated at ....., Michigan, this ....., day of ....., 19.....

No. 25. Motion to Dismiss Bill.

(*Entitle Court and Cause.*)

Now comes the defendant and moves the court to dismiss the bill of complaint herein on the following grounds:

——. It alleges that the premises in question, at the time the claimed lien was alleged to have attached, were owned by said defendant.....and wife ....., as an estate by the entirety; and that the lien claimed against the same was based upon the performance of labor (*or* furnishing of materials) under a written contract signed only by said husband, defendant .....; (*or* under an oral contract,) wherefore said alleged lien is clearly invalid.

——. It alleges that the last of said labor performed by plaintiff was performed on the .....day of ....., 19...., and that the statement of lien made by plaintiff was not filed in the office of the register of deeds of said county until over four months thereafter, to-wit, on the ..... day of ..... 19....; wherefore said alleged lien is void and of no force or effect.

——. It shows that service of a copy of the statement of alleged lien was made upon said defendant....., in the county of ..... (*naming another county*), in said state, whereas the statute provides that service of such statement must be made within the county wherein said premises are situated; wherefore said alleged lien is invalid.

(*Add other paragraphs as the facts warrant.*)

This motion is based on the record and files in said cause.

.....

Attorney for .....

Dated this..... day of

..... 19.....

No. 26. Answer by Owner—Clauses.

(*Entitle court and cause and insert necessary formal paragraphs.*)

(*Admit or deny the allegations of the bill to suit the particular case.*)

——. The defendant further answering shows, that notwithstanding he has (*or make in past tense throughout*) been willing that said plaintiff should continue to perform and complete said contract and has done, and holds himself in readiness to do, everything reasonably required of him to that end, and has made, or held himself in readiness to make payments upon the said contract in strict accordance with its terms, the said plaintiff after undertaking the work under his contract and after partially completing the same (*state the extent to which completed*), without cause, provocation or fault on the part of this defendant, abandoned the said contract and the work thereunder and refused to continue or to complete the same; that thereupon and therefore this defendant took over and completed the said structure (*or* work, *describing the same*) and completed the same; that in the event of full performance of said contract, the plaintiff would have been entitled to receive therefor the sum of $.....; that the payments to the said contractor pursuant to said contract amounted to the sum of $..... (*if subcontractors, materialmen or laborers are plaintiffs or have intervened, averments may be made to show the amounts paid to contractor and distributed, etc.*); that liens have been claimed upon the said premises in addition to the lien of the said plaintiff, which are now valid or subsisting claims or liens to the amount of $....., and that the cost to complete the said structure after the said abandonment and in accordance with the said contract amounted to the sum of $....., and that the said advances to said plaintiff (*or* amounts advanced and paid out for labor and materials) plus the amounts of the valid and subsisting liens plus the cost of completion, amount to more than the contract price, wherefore the said plaintiff has no valid lien or right to lien and the said bill should be dismissed and said lien discharged.

——. That in the construction or erection of said struc-

ture (*or* performance *or* work, *whatever it was*), the said plaintiff did the same in a careless, indifferent and unworkmanlike manner and permitted and caused therein certain defects and imperfections and failed to carry out the terms of the contract in the following particulars to-wit, (*state particulars of defective or imperfect construction, or construction not in accordance with the terms of the contract*); that when said structure was turned over to this defendant (*or* when he took possession of the same, *in case of abandonment, etc.*) such defects existed and appeared; that such defects were in no way due to any act, conduct or omission of this defendant and that he did not at any time approve or consent to such construction in the manner followed; that he has called the same to the attention of the said plaintiff and has given him ample opportunity to remedy the same, which he has refused and neglected to do; that by reason of such incomplete and defective performance and failure to complete in accordance with the contract, this defendant has been injured and damaged to the extent of $..... (*or* has expended the sum of $..... in remedying the defects); that the said sum is no more than is fair, just and equitable or sufficient to give to this defendant a completed structure in accordance with said contract, and is no more than is sufficient to compensate him for his injury and damages or for his necessary disbursements to so alter the structure as to be in accordance with such contract.

——. That the said statement or claim of lien referred to and sought to be enforced in said bill is incomplete and insufficient in this:

(That it was not filed within the time fixed by statute.)

(That it was not served within the time fixed by statute.)

(That it was not served in the manner fixed by statute, *as that it was served outside the county, or upon an agent when defendant could have been found, or upon an agent not in charge, or by posting when defendant or an agent in charge could have been found within the county.*)

(That it was intentionally, knowingly and wilfully excessive in the amount for which lien was claimed, *or* because including material *or labor, etc.,* not entering into the structure, *etc.*)

(That the property is improperly described, or owner or contractor improperly named.)

(That the claim was not properly verified or signed, or did not contain all of the statutory requisites.)

Wherefore no lien in fact or in law resulted from the claim or filing of the same, and the said claim and statement is null and void, and this defendant is entitled to have the same discharged of record and the cloud thereof removed from his title.

——. That the said premises against which said lien is claimed, at the time of the commencement of said structure (*or other work*), constituted an estate by the entireties or a homestead (*state details*) and that no written contract therefor signed by both the husband and wife was at any time entered into or existed as required by statute as a prerequisite to lien in such cases, wherefore no right of lien could or did arise against said premises or any part thereof, and that any and all claims of lien for or on account of the said work or construction, and specifically the lien claimed and sought to be enforced in this proceeding, are illegal, void, and of no effect, and defendant is entitled to have the same discharged.

——. That notwithstanding the said bill and the lien claimed and sought to be enforced therein alleges..... ....., 19...., as the date of the furnishing of the last of the materials or labor in accordance with said contract, said statement is in fact erroneous and untrue in this, that the said structure was finally completed and all work and labor thereon performed prior to that date, and that the said plaintiff after such full completion, designing and intending to wrongfully extend the time within which he might claim a lien upon the said premises, and not in accordance with said contract and without the request or acquiescence of

this defendant, furnished certain other and additional materials and labor not essential to the completion of said work, and that his said claim of lien is based upon and dated from the said furnishing and that if the filing of said claim of lien be dated from the last actual furnishing or performance in good faith under the contract, it was not, and cannot be construed to be, filed within the statutory sixty day period, wherefore this defendant is entitled to a discharge thereof and to the removal of the cloud caused thereby upon his title.

——. That under the said contract this defendant was entitled to a structure as follows (*state details*); that the said structure was not erected in accordance with such contract in this, that (*state details*); That this defendant did not at any time consent to or acquiesce in any change or alteration in said contract or in any variation in the terms thereof; that thereby and in consequence thereof no right to lien under such contract arose, and the claiming of lien upon said premises is inadequate and insufficient to create a lien and the defendant is entitled to a discharge of the same; that by reason of such altered and changed construction the said defendant has been injured and damaged in this, that (*state details*) and is entitled to damages and to a deduction from the agreed price on account thereof; that he has demanded a structure in accordance with such contract or, in lieu thereof, a deduction from the contract price sufficient to compensate him for the deviation therefrom and that said demands have been refused. (*Or if payments have been made on the contract equal to the value of the structure to defendant, payment for damages for breach of the contract may be alleged.*).

No. 27. Crossbill by Owner for Defective Performance, etc.

(*Entitle Court and Cause.*)

The answer of defendants William and Fredericka Klein to the Bill of Complaint of Simon Frohlich, doing business as the Frohlich Glass Company.

Defendants William and Fredericka Klein, reserving to themselves all right of exception to said bill, for answer thereto say:

First—These defendants admit paragraphs one and two of said bill.

Second—These defendants admit that plaintiff furnished the factory work for the building referred to in said bill, but deny that said material so furnished by plaintiff was according to the requirements of the plans and specifications. That said materials were inferior in quality to that required by the specifications and were not properly kiln dried as required by the contract and specifications. That as a result of said materials not being properly kiln dried the doors have shrunk to such an extent that they have become worthless, and much of the carpenter work throughout the building is rendered unsatisfactory by reason of the shrinkage of the materials furnished by plaintiff.

Third—These defendants neither admit nor deny the allegations contained in paragraphs four and five of the bill, but leave plaintiff to his proofs thereof.

Fourth—These defendants deny the allegations contained in paragraph six of the bill, and deny that plaintiff furnished the material and performed the work upon said building according to the plans and specifications, and further deny that these defendants accepted the said building. They admit that they have taken possession and are now occupying the same.

Five—These defendants neither admit nor deny paragraphs seven, eight and nine of said bill, but leave plaintiff to his proofs thereof.

And these defendants, Wm. Klein and Fredericka Klein, further answering, claim the benefit of this answer as a cross-bill, and ask the Court for affirmative relief against the said plaintiff, and the defendants Gustav A. Hansel and William Schmidt, co-partners as Hansel & Schmidt, and represent to the Court as follows:—

1. These defendants purchased from Theodore Goren-

flo lot fifty-five (55) of Gorenflo's subdivision, said lot being situated at the southwest corner of Mt. Elliott Avenue and Warren Avenue, in the City of Detroit; that on the 21st day of March, 1906, they entered into a written contract for the construction of certain buildings, a true copy of which said contract is hereto attached and marked "Exhibit A".

2. That according to the terms of said contract the said Hansel & Schmidt agreed to furnish all labor and material to construct said buildings according to the plans and specifications prepared by Hans Gehrke, architect; that said work was to be done in a first-class and workmanlike manner, and said buildings when completed should be first-class in workmanship and material, and said contractors agreed to make perfect any defects that were apparent within one year after the completion of said building.

3. That the defendants, William and Fredericka Klein, have paid or caused to be paid to the said Hansel & Schmidt, contractors, the sum of Five Thousand Nine Hundred Fifty-three Dollars ($5,953.00), leaving a balance in their hands due upon said contract of One Hundred and Ninety-two-Dollars ($192).

4. That the said contractors performed the work of constructing said buildings in an unworkmanlike manner, and furnished materials inferior to those specified and required by the contract and specifications, viz: The cellar is not of the required uniform height; the cement walls are not plastered with cement mortar, as required, so that the basement is wet after heavy rain storms and the water stands upon the cellar floor; that the tile drains and sewer have never worked perfectly, and that the kitchen sink and laundry tubs are almost constantly blockaded; that the store windows are not properly set in putty as required, and are in a leaky condition; that the doors have shrunk to such an extent that they have become worthless; that the finishing lumber has never been properly sandpapered or finished; that the entire finishing, lumber, doors and frames, etc., was not properly kiln dried; that said woodwork has never been

properly painted, oiled or varnished; that the material and workmanship throughout the entire building is inferior to the requirements of the contract and specifications; that the plaster is badly popmarked and cracked, and that the plaster used in the bathrooms is not of the quality or kind required by the specifications; that the head-room going upstairs is not sufficient; that the skylight on roof and the transom over the front store windows and doors are not completed; that the windows do not open or shut properly; that the flour bin was not properly constructed and by reason thereof became broken; that the plaster in the pantry does not meet the window casing and is unfinished; that the chimneys have not been properly plastered on the inside; that the drip board on the kitchen sink leaks; that the transom window and lift was not put into the hall leading upstairs as provided by the specifications. That by reason of the inferior material and workmanship employed in the construction of said building, the defendants, William Klein and Fredericka Klein, have been damaged to the extent of about One Thousand Dollars.

5. Wherefore, these defendants, William Klein and Fredericka Klein, pray that the plaintiff and the said defendants Gustav Hansel and William Schmidt, doing business as Hansel & Schmidt, may be decreed to pay to the said William Klein and Fredericka Klein whatever sum shall appear to be due to them upon the taking of said account, together with all costs of these proceedings.

6. That the above named plaintiff, and parties defendant, in this cause may be requested to make full and direct answer to this defendants' answer in the nature of a cross-bill, according to the rules and practice of this court.

7. And that these defendants may have such other and further relief in the premises as equity may require, and to the Court shall seem meet, and these defendants will ever pray, etc. (Signed) WILLIAM KLEIN[11]

FREDERIKA KLEIN

11. This form used in Frohlich v. Klein, 160 Mich. 142. Other paragraphs of the crossbill may be added as follows:

(*In case the owner damaged because the building not completed on time:*) That the said contract required the work thereunder to be completed and turned over to this defendant on or before the ..... day of....., 19....; that time was of the essence of the contract and was so regarded by both of the parties thereto; that without fault or omission on his part and without sufficient, reasonable or proper excuse or justification upon the part of the said plaintiff, the said structure was not completed or turned over upon the date so fixed nor until the .....day of ....., 19...., and that the damages to this defendant on account of such delay and of such violation of the terms of said contract reasonably amount to the sum of $..... (*show how defendant damaged*), for which he is entitled to affirmative relief and to a decree or judgment against the said plaintiff.

(*In case the cumulated cost to the owner, upon abandonment by the contractor, exceeds the contract price:*) That the said structure was completed by this defendant in a workmanlike and economical manner, with the attempt to keep the same within the contract price, but notwithstanding said attempt the reasonable outlays, costs, disbursements and legal and enforcible claims and liens on account thereof amounted to the sums stated, which exceed the contract price by $....., and that for said excess this defendant is entitled to affirmative relief and to a decree or judgment against the said plaintiff.

No. 28. Crossbill by owner to Make Surety Company a Party Defendant and to Obtain Relief against it.

(*Entitle Court and Cause.*)

This defendant, reserving to himself all right of exception to said bill of complaint, for answer thereto says:

(*Admit or deny, as the case may require, stating the defense or defenses relied upon.*)

——. This defendant, further answering and claiming the benefit of a cross-bill says: That on the .....

day of ....., 19...., said contractor E. F. (*or name subcontractor, as may be*) gave to this defendant a bond in the sum of $....., duly executed by said E. F. (*or name subcontractor, if his bond*) with P. Q. (and one R. S., *if two*) as surety (*or* sureties) thereon, conditioned to protect this defendant against any mechanics' liens that might be claimed against said land and premises, a copy of which instrument is attached hereto, marked "Exhibit A" and made a part of this answer by way of crossbill; that said bond was accepted by this defendant and is still in force.

——. That therefore this defendant should not be held liable for any lien or indebtedness claimed against said premises by plaintiff or any other person, but that any liability therefor should be enforced against said surety (*or* sureties) and that, by reason thereof, said surety (*or* sureties) should be made a party defendant (*or* parties defendant) in this cause, in order that this court may settle and determine the rights and liabilities of all the parties interested in said cause and may make such decree as is necessary to determine and enforce the rights and liabilities of such various parties including said surety (*or* sureties).

——. All of which this defendant is ready to aver, maintain and prove, and prays that he may have the same benefit of this answer as if he had filed a crossbill.

——. And that said surety (*or* sureties) P. Q. (and R. S.) be made a party defendant (*or* parties defendant) in this cause, and that he (*or* they, *and including said plaintiff and all other lienors made parties or intervening*) be required to answer so much of this answer as is in the nature of a crossbill, without oath, answer under oath being hereby waived.

——. And that said surety P. Q. (*or* said sureties P. Q. and R. S.) be decreed to pay any amount that may be found to be due to plaintiff herein with interest and costs; and this defendant be relieved therefrom, and from the liens and claims of liens filed against his property and from all

proceedings to enforce the same and that his premises be decreed to be free from such liens, and that said alleged liens may be discharged.

——. And that this defendant may have such other and further relief as to this court shall seem meet.

.....

.....

Attorney for Defendant .....
(*Business Address.*)

(*Add proper verification.*)

No. 29. Order (based on Affidavit and Motion or on Stipulation) making Surety Company a Party Defendant and Permitting Owner to File Crossbill for Relief against it.

(*Entitle Court and Cause, and Caption.*)

In the above entitled cause, upon reading and filing the affidavit of ....., and upon motion of said defendant..... (*or* upon reading and filing the stipulation of the plaintiff..... and of the defendant .....), it is ORDERED that the ..... a corporation organized and existing under the laws of the state of ....., be and the same is hereby made a party defendant to the above entitled cause; and that said ..... (*naming defendant owner*) be and is hereby permitted to file his crossbill in said cause within..... days from the date hereof against said defendant..... (*naming original contractor*) and said ..... (*naming surety company*), and that, upon the filing of said crossbill, the Clerk of this Court issue process against the said ....., (*original contractor*) and said..... ..... (*surety company*) as defendants and in favor of said ..... (*owner*) as cross plaintiff.

.....
Circuit Judge.

No. 30. Crossbill by Owner to Obtain Relief against Surety Company.[12]

C. L. 1915 (14805).

(*Entitle Court and Cause*).

John F. Dodge and Horace E. Dodge, doing business as Dodge Brothers, defendants in the above entitled cause, for the purpose of obtaining affirmative relief against The L. P. Hazen Company, one of the defendants in said cause, and the Massachusetts Bonding and Insurance Company, of Boston, Massachusetts, the surety on the bond of the said The L. P. Hazen Company, in the matters involved in said cause, respectfully show unto the Court as follows:

1. That on, to-wit, the fifteenth day of March, 1910, the said The L. P. Hazen Company was, as your orators are informed and believe, a corporation organized and existing under the law of the State of Ohio, and having its principal office in the City of Cincinnati, said State of Ohio; and that the said The Massachusetts Bonding and Insurance Company was a corporation organized and existing under the laws of the State of Massachusetts, and having its home office in the City of Boston, State of Massachusetts.

2. That your orators are engaged in business as a copartnership under the name of Dodge Brothers, in the city of Detroit, Michigan; that on, to-wit, the fifteenth day of March, 1910, your orators doing business as Dodge Brothers and in that name, entered into a contract with the said The L. P. Hazen Company for the construction by said The L. P. Hazen Company, of a certain building in the city of Detroit, upon certain premises owned by your orators and described as follows, to-wit: * * * * * * * * *

That the said contract so entered into between your orators and The L. P. Hazen Company, as aforesaid, was in

12. This form used in C. H. Little Co. v. L. P. Hazen Co., 185 Mich. 316. It will be noted that this form throughout uses the term "your orators" in describing the defendants filing the crossbill. While that form is still proper it is preferable to use "these defendants" or similar designation.

the words and figures following: * * * * * * * *

3. Your orators further show that at the time of the execution and delivery of such contract between your orators and The L. P. Hazen Company, as aforesaid, or shortly thereafter, and on to-wit, the twenty-fifth day of March, 1910, the L. P. Hazen Company, aforesaid, as principal and the said The Massachusetts Bonding and Insurance Company, as surety, executed and delivered to your orators, a bond to secure to your orators the faithful performance of said contract, aforesaid, by the said The L. P. Hazen Company, which said bond is in the words and figures following: * * * * * * * * * * * * *

4. That the L. P. Hazen Company on, to-wit, the twenty-sixth day of March, 1910, commenced work under the aforesaid contract, and continued in the construction of the building and work thereon, provided on its part to be done by the terms of said contract, continuously up to, to-wit, the sixteenth day of September, 1910; that from the time said The L. P. Hazen Company, commenced work under said contract as aforesaid, and up to the sixteenth day of September, 1910, the said The L. P. Hazen Company at no time discontinued or abandoned said work or did anything to indicate to your orators that it did not intend and was not at all times endeavoring and able to complete said work and building.

That on, to-wit, the sixteenth of September, 1910, the said The L. P. Hazen Company, abandoned said work and said building and thereafter refused and neglected to continue the construction of said building, and to complete the work provided to be done by it under and by virtue of the terms of said contract.

5. Your orators further show * * * * (*setting up adjudication in bankruptcy of The L. P. Hazen Co.*)

6. That your orators have at all times performed all things on their part to be performed under and by virtue of the terms of said contract, and that your orators upon learning that said The L. P. Hazen Company had abandoned

said work notified the said The L. P. Hazen Company as follows: * * * * * * * * * * * *

7. Your orators further show that after notifying said The L. P. Hazen Company, as aforesaid, on to-wit, the seventeenth day of September, 1910, the solicitors of your orators on, to-wit, the nineteenth day of September, 1910, notified the said The Massachusetts Bonding and Insurance Company, by telegram as follows: * * * * * and that on the same day, your orators' solicitors caused to be mailed to said The Massachusetts Bonding & Insurance Company by registered mail the following letter: * * *

8. That upon said The L. P. Hazen Company abandoning the work on said buildng, as aforesaid, and to-wit, the seventeenth day of September, 1910, Albert Kahn and Ernest Wilby, his associate, the architect of said building having charge of the construction thereof, delivered to your orators a certificate in the words and figures as follows: * * * * *

That upon receipt of said certificate from said architect by your orators, your orators caused notice to be delivered to said The L. P. Hazen Company, as aforesaid, and that your orators enclosed a copy of the architect's said certificate and a copy of the notice delivered to said The L. P. Hazen company by your orators, in the letter mailed by your orators to said The Massachussetts Bonding & Insurance Company at its office in the city of Boston on the nineteenth day of September, 1910, as aforesaid * * * * * and that same were duly received by said company.

9 Your orators aver that upon the receipt by your orators of such certificate from said architect as aforesaid, and upon notification by your orators to said The L. P. Hazen company as aforesaid, your orators became entitled after a lapse of forty-eight hours from the giving of such notice to said The L. P. Hazen Company as aforesaid, to terminate the employment of said The L. P. Hazen Company and to enter upon said premises and take possession, for the purpose of completing the work included under the contract, of all

materials, tools and appliances thereon and to employ any other person or persons to finish the work and provide materials therefor.

10 Your orators further show that upon the receipt of said letters from said The Massachusetts Bonding & Insurance Company as aforesaid, and in order to give said The Massachusetts Bonding & Insurance Company an opportunity to investigate the situation and determine its course, as surety upon the bond of said The L. P. Hazen Company, and in order to ascertain the wishes of said company in the premises, your orators awaited the arrival of the representative of said company mentioned in said letters, before taking any steps toward the completion of said building.

* * * * * *(setting up correspondence, etc., with surety company).*

12. * * * * * That your orators waited until noon of the sixth day of October, 1910, and that neither your orators, nor their solicitors heard anything further from any representative of said company, and that your orators' solicitors thereupon wrote said The Massachusetts Bonding & Insurance Company as follows: * * * *(to effect that orators were today entering into the necessary contracts to complete the work)* * * * .

13. Your orators further show that as soon as possible after said letter of October 6, 1910 was sent to said Massachusetts Bonding and Insurance Company as aforesaid, and on, to-wit, the sixth day of October, 1910, your orators commenced the completion of said building, and that your orators caused the work on said building to be carried on as rapidly as possible, and that said building was completed by your orators on the 28th day of February, 1911.

14. Your orators aver that they would have at once, after said The L. P. Hazen Company abandoned said work, and as soon as their legal rights under said contract would permit, have commenced the work of completing said building, had your orators not been delayed by the said The Massachusetts Bonding and Insurance Company's investiga-

tions and refusal to decide whether it, said company, as surety for said The L. P. Hazen Company desired to complete said building itself or whether it desired your orators to complete same.

And your orators aver that the delay on the part of said The Massachusetts Bonding and Insurance Company and its refusal to come to a decision in the premises caused a delay in the completion of said building of, to-wit, sixteen days.

15. Your orators further show that in completing said building, your orators endeavored to incur as little expense as possible and that the completion of said building was conducted in accordance with the terms of said contract, and that the amounts expended by your orators in the completion of said building were proper, reasonable and necessary amounts.

And your orators show that your orators were compelled to expend in the completion of the said building, over and above the sums theretofore paid by them to said The L. P. Hazen Company, on account of said building the sum of fifty thousand, three hundred and fifty-one and 72/100 ($50,351.72) dollars, and that your orators had paid to said The L. P. Hazen Company, before it abandoned the said work, on account of said contract, the sum of forty-eight thousand, eight hundred thirty-seven ($48,837.00) dollars, and that your orators have paid out in and about the construction and completion of said building the sum of thirteen thousand, eight hundred thirty-four and 91/100 ($13,834.91) dollars over and above the contract price of said building.

And your orators aver that it is the duty of the said The L. P. Hazen Company and the said The Massachusetts Bonding and Insurance Company, under the terms of said contract and bond aforesaid, to repay said sum of Thirteen thousand, eight hundred thirty-four and 91/100 ($13,-834.91) dollars to your orators with interest thereon at the rate of five per cent per annum from the thirty-first day

of July, 1911.

16. Your orators further show that under the terms of said contract, the said building should have been completed by the said The L. P. Hazen Company not later than the fifteenth day of July, 1910. That because of the fault of said The L. P. Hazen Company, and because of said The L. P. Hazen Company's failure to complete said building, said building was not finally completed until, to-wit, the 28th day of February, 1911, and that your orators lost the use of said building and the rentals to be derived therefrom, through the fault of the said The L. P. Hazen Company, for a period of, to-wit, seven and one-half months.

That in and by said contract, it is provided "All work covered by this contract to be completed by July 15, 1910. * * * It is agreed that in the event the contractor does fail to make delivery by the said July 15, 1910, he shall pay to the owner the full amount of the rentals the owner lost by such failure."

And your orators aver that they lost through the failure of said The L. P. Hazen Company to complete the said building in accordance with the terms of said contract, rentals from said building and land amounting to the sum of, to-wit, ten thousand five hundred ($10,500.00) dollars, and that your orators sustained a loss through the failure of said The L. P. Hazen Company to complete said building in accordance with the terms of said contract through damages occasioned to your orators by reason of being unable to have the use and occupation of said building and the rentals therefrom, from the 15th day of July, 1910, to the 28th day of February, 1911, of the said sum of ten thousand five hundred ($10,500.00) dollars.

And our orators aver that it is the duty of said The L. P. Hazen Company and the said The Massachusetts Bonding and Insurance Company under the terms of said contract and said bond, to repay said sum of ten thousand five hundred ($10,500.00) dollars, to your orators with interest thereon at the rate of five per cent per annum from the 28th day of February, 1911.

17. Your orators further show that C. H. Little Company, the plaintiff in the above entitled cause has filed a claim of mechanics' lien against the premises of your orators aforedescribed, and that said C. H. Little Company claims to have a right of lien against said premises and building aforementioned for material furnished and labor performed for said The L. P. Hazen Company in connection with the construction of said building for, to-wit, the sum of thirty-four hundred and fifty-six and 87/100 ($3,456.87) dollars, and that said C. H. Little Company has by its bill of complaint filed in the above entitled cause asked that said lien be enforced by the decree of this court against the premises of your orators aforedescribed. * * * * * * * * (then follow 16 similar paragraphs setting up the respective sums claimed by other lien claimants).

18. Your orators further show that by the terms of said contract and bond aforementioned, it became and is the duty of said The L. P. Hazen Company and said The Massachusetts Bonding and Insurance Company to pay and discharge all indebtedness that was incurred by the said The L. P. Hazen Company in carrying out the said contract, and that it became and was the duty of the L. P. Hazen Company and The Massachusetts Bonding and Insurance Company to complete said building and deliver same to your orators free of all mechanics' liens, and that it is the duty of The L. P. Hazen Company and The Massachusetts Bonding and Insurance Company to pay any and all of the aforesaid claims of lien that may be held to be valid liens against the property of your orators aforedescribed, and to cause all of said claims of lien aforementioned to be discharged as against the said property and premises of your orators.

And your orators further show that by the terms of said contract and bond aforementioned, it became and is the duty of said The L. P. Hazen Company and the said The Massachusetts Bonding and Insurance Company to pay all

costs and attorneys fees incurred by any of the aforementioned lien claimants in enforcing the payment and collection of any and all indebtedness incurred by the said The L. P. Hazen Company in carrying out the aforesaid contract.

19. And your orators further show that said bond aforementioned was by the provisions of same made for the use and benefit of all persons who might or should become entitled to liens under said contract aforementioned, according to the provisions of law, and that any of said lien claimants aforesaid might have sued upon said bond as if same had been executed to them or either of them in proper person, and that any and all of said lien claimants aforementioned had the right and still possess the right to cause said The Massachusetts Bonding and Insurance Company to be made a party defendant to the above entitled cause, and to ask that such decree as may be made in favor of any of such lien claimants shall also be made a decree against the said The Massachusetts Bonding and Insurance Company, and that said The Massachusetts Bonding and Insurance Company shall be by the decree of this court directed to pay to the various lien claimants aforesaid such an amount as this court shall find to be due to said lien claimants under and by virtue of the terms of said contract aforesaid, and the statute in such case made and provided.

20. And your orators further show that the claims of said lien claimants, and which they are seeking to enforce against the property of your orators, as aforesaid, amount in the aggregate to the sum of eighteen thousand, eight hundred and forty-seven and 54/100 ($18,847.54) dollars.

21. Your orators further show that in order to avoid a multiplicity of litigation and in order to obtain an accounting between your orators and said The L. P. Hazen Company, and said The Massachusetts Bonding and Insurance Company, in reference to the amounts expended by your orators in completing said building aforesaid, and

in reference to the loss of rentals sustained by your orators through the failure of said The L. P. Hazen Company to complete said building within the terms of said contract, and in reference to the amount due the various lien claimants as aforesaid, and the costs and attorneys fees of said lien claimants in enforcing payment and collection of their said claims, and the amount of the liability of said The Massachusetts Bonding and Insurance Company thereon, that it is necessary that said The Massachusetts Bonding and Insurance Company be made a party defendant to the above entitled cause.

Your orators therefore pray:

1. That said The L. P. Hazen Company and said The Massachusetts Bonding and Insurance Company may answer this cross bill of complaint.

2. That said The L. P. Hazen Company and said The Massachusetts Bonding and Insurance Company may come to an accounting with your orators as to the amount due your orators from The L. P. Hazen Company and The Massachusetts Bonding and Insurance Company for the sums expended by your orators in the completion of said building, as aforesaid, and for the amounts of rentals lost by your orators through the failure of said The L. P. Hazen Company to complete said building in accordance with the terms of said contract, and as to the amount of indebtedness of said The L. P. Hazen Company remaining due and unpaid for the construction of said building, and as to the amount of such indebtedness due to each of said lien claimants aforesaid, and as to the amount of costs and attorneys fees incurred by each of said lien claimants aforesaid in enforcing the payment and collection of any and all of said indebtedness incurred by The L. P. Hazen Company in carrying out said contract.

3. And that said The L. P. Hazen Company and said The Massachusetts Bonding and Insurance Company may be decreed to pay to your orators the said sum of thirteen thousand eight hundred and thirty-four and 91/100

($13,834.91) dollars expended by your orators in the completion of said building over and above the contract price of same to said The L. P. Hazen Company.

4. That said The L. P. Hazen Company and said The Massachusetts Bonding and Insurance Company may be decreed to pay to your orators the sum of ten thousand, five hundred ($10,500.00) dollars, being the amount of rentals and loss sustained by your orators through the failure of the said The L. P. Hazen Company to complete said building in accordance with the terms of said contract, and being damages occasioned to your orators by reason of being unable to have the use and occupation of said building and the rentals therefrom from the 15th day of July, 1910, to the 28th day of February, 1911.

5. That said The L. P. Hazen Company and said The Massachusetts Bonding and Insurance Company may be decreed to pay each of said lien claimants aforesaid, such sum as this court may find to be due said lien claimants respectively in the premises, together with the costs and attorneys fees incurred by each of said respective lien claimants in enforcing the payment and collection of their said respective claims.

6. For such other and further relief as shall be just in the premises. (Signed) JOHN F. DODGE,
HORACE E. DODGE.

No. 31. Crossbill by Lien Claimant named as Party Defendant in Original Bill.

(*Entitle Court and Cause.*)

This defendant, reserving to himself all right of exception to the said bill of complaint, for answer thereto says:

(*Admit or deny as the case may require, stating the defense or defenses relied upon.*)

——. This defendant, further answering and claiming the benefit of a crossbill says: That said E. F. after enter-

ing upon and commencing the said building and construction (*or otherwise as may be*) of the said....., did, in that behalf, afterwards, and on or about the..... .....day of ....., 19...., make an agreement with this defendant, that this defendant should do and perform certain work and labor thereon (*or* furnish certain material therefor), for the consideration and compensation of ....., payable as follows..... (*state terms of contract fully, and if it was in writing, add:* a copy of which contract is attached hereto, marked "Exhibit A" and made a part of this answer.) (*Vary to fit the facts, stating employment by subcontractor, if such be the case.*)

(*The next six paragraphs, same as paragraphs 4 to 9 inclusive of form for bill by laborer or materialman, changing the word "plaintiff" to the words "this defendant" where appearing and varying to fit facts; then proceed:*)

——. All of which this defendant is ready to aver, maintain and prove, and he therefore prays:

I. That he may have the same benefit of this answer as if he had filed a crossbill; that said A. B., and C. D. and said E. F. (*or name subcontractor, if agreement with him*) may without oath, answer under oath being hereby waived, answer all and singular the matters herein charged and set forth; and that they may come to a just and true account with this defendant in the premises.

(*Proceed to conclusion as in form for bill by laborer or other claimant as the case may be, changing the term "plaintiff" to "this defendant" where appearing, varying to suit the facts, and adding proper verification.*)

No. 32. Motion or Petition to Intervene by Lien Claimant.

(*Entitle Court and Cause and Address.*)

Your petitioner L. M., respectfully shows:

1. That on or about the ..... day of ...., 19...., one E. F., a contractor, entered upon and

commenced the building and construction (*or* repairing *or as may be*) of a..... upon the premises described in the original bill of complaint filed in said cause pursuant to a contract and agreement previously made by him on or about the ..... day of ....., 19...., for such building and construction (*or* repairing, *etc.*) with said C. D., the owner of said premises; that in that behalf the said E. F., on or about the ..... day of ....., 19...., entered into a contract (*if in writing, say so*), with your petitioner to do and perform certain work thereon (*or* to furnish certain materials therefor), to-wit: ....., for and in consideration of $....., payable as follows: ..... (*State terms of contract fully, and if it was with a subcontractor, vary to fit facts*).

2. That in pursuance of and in compliance with said contract your petitioner faithfully performed said work (*or* furnished said materials), performing the first of said work (*or* furnishing the first of said material) on the .....day of ....., 19...., and the last thereof on ..... day of ....., 19....; that within sixty days after the performance (*or* furnishing) of the last of said work (*or* materials), to-wit, on the ..... day of ....., 19...., your petitioner made and filed with the register of deeds of said county a true and duly verified statement of the amount due him therefor, and within ten days thereafter, to-wit, on the ..... day of ....., 19...., he served a copy of the same upon said C. D. within said county (*or* upon G. H., agent of said C. D., having charge of said premises within said county, said C. D. being then absent from said county; *or if substituted service state facts as to posting upon premises and reasons therefor*); and later, to-wit, on the ..... day of ....., 19...., your petitioner filed proof of such service in the office of the register of deeds of said county; all in accordance and full and strict compliance with the statute in such case made and provided.

3. That by reason thereof a valid and enforcible lien against the said premises and in favor of your petitioner arose, and that neither said lien nor the debt underlying the same has been paid, satisfied, discharged, waived, assigned, terminated or in any manner relinquished (*enlarge or limit to fit the facts*), and that there is now due and owing your petitioner thereon, over and above all legal setoffs, the sum of $.....

4. That the plaintiff herein, in his bill of complaint filed in said cause, failed and neglected to name your petitioner as a party defendant therein; that said cause is now pending, and that for the enforcement of said lien and debt your petitioner is entitled to intervene and assert his rights and establish and foreclose such lien in said cause.

5. Your petitioner therefore prays that he may be allowed to intervene and become a party defendant in said cause and to file an answer claiming the benefit of a cross-bill for the enforcement of his lien therein.[12a]

.....

.....

Attorney for Petitioner.
(*Business Address.*)
(*Add proper verification.*)

No. 33. Petition to Intervene, after Proofs Taken.[13]
(*Entitle Court and Cause.*)

(1) Your petitioners, Furstenberg Brothers, of the City of Saginaw, Michigan, would respectfully represent that they are engaged in the sale of lumber and materials in the City of Saginaw.

(2) Your petitioners would further show that they furnished material to the amount of $309.56 at the instance and request of Charles Knoop, who was re-building, altering

12a. When the order allowing intervention is granted and entered, the claimant petitioner should answer, claiming affirmative relief by crossbill.

13. This form used in Kleinert v. Knoop, 147 Mich. 387.

and improving the dwelling at No. 229 S. Fourth street, in the City of Saginaw, owned and occupied by Henry F. Mertz and Minnie Mertz, his wife.

(3) Your petitioners would further show that the said Henry F. Mertz was informed and advised that the lumber and material furnished to the contractor, Charles Knoop, was supplied by the firm of Furstenberg Brothers; that $100.00 was paid to deponents on August 26, 1905, but the balance remaining over and above all legal set-offs was the sum of $209.56.

(4) Your petitioners would further show that in order to preserve their rights in the premises a notice of lien was duly filed, with a copy of the account attached, lien was duly filed, with a copy of the account attached, in the office of the Register of Deeds on the 27th day of November, 1905, and that due proof of service was also filed in the office of the Register of Deeds, as will more fully appear by the proof of service now on file and lien on file, to which reference is hereby made; a copy of which lien is hereto attached and account also attached, marked Ex. A, and made a part of this petition.

(5) Your petitioners would further show that they are informed and believe that Charles Knoop is not collectible, and that they will lose their claim unless the same is enforced against lot 4, block 55, of Glasby and Gallagher's addition to the City of East Saginaw, now City of Saginaw.

(6) Your petitioners would further show that they have been informed recently that a bill was filed in the above entitled cause to foreclose a lien claimed to be held by the plaintiff; that the same is now pending, and your petitioners ask this honorable court that they be allowed to intervene or file a cross-bill, to the end that their interests may be protected, and the amount claimed to be due these petitioners obtained from the materials furnished to said Charles Knoop that went into the construction of the dwelling owned and occupied by said Henry F. Mertz and his wife, Minnie Mertz.

(7) Your petitioners would further show that they have not been informed of the above suit until very recently, to-wit: about ten days ago, and after proofs had been taken, but that said suit is still pending, and your petitioners ask that they be allowed to intervene, file a cross-bill and make proof of their claim in the premises.

(Signed) FURSTENBURG BROS.

No. 34. Order, Based on Petition, making Intervening Lien Claimant a Party Defendant and Allowing Him to File Crossbill for Affirmative Relief.

(*Entitle Court and Cause and Caption.*)

In the above entitled cause, upon reading and filing the petition of ....., praying for leave to intervene in, become a party to and answer the bill of complaint filed in, said cause, and to seek affirmative relief by cross-bill therein, and it appearing that such right to intervene should be granted, it is ORDERED that the prayer of said petitioner be granted and that said ..... be and he is hereby permitted to intervene and become a party defendant in said cause; and that said ..... as a party defendant be and he is hereby permitted to file an answer and crossbill in said cause within ..... days from the date hereof against said defendant ....(*naming original contractor or subcontractor*) and said ..... (*naming owner*) and against any other proper parties for the purpose of securing such affirmative or other relief as he may deem himself entitled to.

.....

Circuit Judge.

No. 35. Crossbill of Intervening Lien Claimant.[14]

(*Entitle Court and Cause.*)

The answer in the nature of a cross-bill of R. R. Brenner to the bill of complaint of John F. Noud Company, a Michigan corporation.

14. This form used in John F. Noud Co. v. Stedman, 193 Mich. 459; 160 N. W. 547. It is preceded by motion to the Court and notice to plaintiff, under section 10 (C. L. 1915 §14805).

Comes now R. R. Brenner and now and at all times saving and reserving unto himself all manner of benefit and advantage of exception to the bill of complaint and reserving all his rights, for answer to the said bill, says that after the filing of the bill in this cause he filed with the register of deeds a lien against the building and premises involved in the above entitled case, that he was not therefore made a party defendant but that having similar rights to the other lienors he desires to intervene as a defendant so that his rights may be determined at the hearing of this cause.

(1). The said R. R. Brenner admits the allegations of the first paragraph of said bill.

(2). The said R. R. Brenner admits the allegations of the second paragraph so far as the same applies to the building but has no knowledge of the contract with plaintiff and therefore neither admits nor denies the same.

(3). With reference to the 3rd, 4th, 5th, and 6th paragraphs the said R. R. Brenner neither admits nor denies the same not having sufficient knowledge upon which to base the admission or denial thereof.

(4). And the said R. R. Brenner by way of and that he may be granted, affirmative relief charges as follows:

(a). That heretofore to-wit on the 22nd day of November A. D. 1911, Alva Stedman and Frank B. Stedman were the owners of the east half of lot twelve (12) block thirteen (13) Hale, Conger & Co.'s addition to the village, now city, of South Haven and were in possession thereof, their title and possession being that of vendees in and under a land contract from Ellen R. Avery, in whom the record title to said premises then stood.

(b). That being such owners and in possession thereof the said Alva Stedman and Frank B. Stedman entered upon and commenced the building and construction of a one story brick theater building on the said lands and premises, and on or about the 19th day of December, A. D. 1911, the said Alva Stedman and Frank B. Stedman

made a contract and agreement with R. R. Brenner for a heating plant for said building.

(c). That the said R. R. Brenner on or about the 19th day of December, 1911, began the performance of said contract and the furnishing of labor and material for such heating system and completed the same and added as an extra by agreement of the parties a vacuum system at an expense of $12.50, that the entire heating system was to cost three hundred dollars and was to be paid for as soon as completed; that the last material provided in connection with said contract was furnished and labor performed December 17, 1912, that said contract was performed, labor performed and materials furnished in accordance with the terms, stipulations and agreements made with reference thereto.

(d). That no suit has been filed by the said R. R. Brenner for the recovery of the amount of said contract, that he has not received pay therefor and that he holds no security for said debt.

(e). That within sixty days after the furnishing and delivering of the last of such labor and material this claimant made and filed on, to-wit the first day of February, 1913, in the office of the register of deeds of Van Buren county a just and true statement and affidavit of claim of lien showing the amount due to him over and above all legal off-sets, counter claims and payments, setting forth the time when the first of said labor and material was furnished and when the last of said labor and material was furnished, with whom said agreement was made, which was duly verified by the affidavit of R. R. Brenner which said statement and affidavit were in words and figures as follows: * * * * * *

(f). That said affidavit with contract attached was filed with the register of deeds on February 1, 1913, at 5 o'clock p. m. and was recorded in Liber 1 of Index of Liens on page 58.

(g). That there is now justly and truly due R. R.

Brenner the sum of three hundred five and 50/100 dollars, together with interest. That nothing has been paid on said contract in any manner except the seven dollars already credited and the said A. Stedman & Son has no off-set thereto or counter-claim thereto.

(1) And the said R. R. Brenner therefore prays that an accounting may be had and that the amount found due to him may be decreed to be a lien on the premises aforesaid and upon the building and appurtenances thereon.

(2) And that the said Alva Stedman and Frank B. Stedman be decreed to pay to R. R. Brenner the amount so found to be due him with interest and the costs by a day to be fixed in said decree. That in default of such payment the said lands and premises may be sold by and under the direction of this court and the proceeds distributed according to such decree as this court may enter.

(3) That in case of sale it be conducted according to paragraphs six and seven of the prayer of plaintiff's bill.

(4) That if the said lands and premises or building and appurtenances shall not sell for enough to pay the amount due the said R. R. Brenner that a personal decree may be entered against the said Alva Stedman and Frank B. Stedman and that he may have execution therefor.

(5) And that the said R. R. Brenner may have such other and such further relief in the premises as shall be agreeable to the lien law of this state and as is provided by statute for intervening lienors.

(6) And this defendant will ever pray, etc.

(Signed) R. R. BRENNER.

No. 36. Petition for Leave to File Supplemental Bill.[15]

(*Entitle Court and Cause and Address.*)

Your petitioner, Mary Wilcox, one of the defendants and cross-plaintiffs in the above entitled cause, respectively represents unto the Court, as follows:

15. This form used in Zilz v. Wilcox, 190 Mich. 486.

1. That on or about the 20th day of December, 1912, the plaintiff, Frederick Zilz filed his bill of complaint herein praying that he might be decreed to have a lien upon the building and lands described in said bill, and that said lands and building be sold to satisfy such lien, and further prayed for other relief, which said bill is hereby referred to and made a part hereof.

2. That fifteen (15) days after service of a copy of said bill upon the defendant and cross-plaintiff, Mary Wilcox, an answer and cross-bill was filed by her which are hereby referred to and made a part hereof.

3. That a hearing upon pleadings and proofs was had before this Court and that a decree was entered therein on the 23rd day of September, 1914, giving a lien upon said building and premises.

4. That a claim of appeal has been filed herein and that the time for settling the case on appeal herein has been extended by written stipulation of all the parties to said cause to April 4, 1915; that * * * * * *(setting up new matter as ground for supplemental bill)*.

5. That petitioner has recently learned and been advised by her solicitor, that it is her duty to present the foregoing testimony of said Frederick Zilz, to this Court and that the same having arisen since the entry of said decree herein, she is entitled to have said decree set aside and vacated.

WHEREFORE, your petitioner prays, as follows:

1. That she may file a supplemental bill herein for the purpose of adding new matter in said cause and for the purpose of setting up a defense to the plaintiff's claim of lien herein, which has arisen since the entry of said decree.

2. That she may have such other and different relief in the premises as to the Court may seem meet.

(Signed) MARY WILCOX.

No. 37. Affidavit Suggesting Death of Lien Claimant After Commencement of Suit.

(*Entitle Court and Cause.*)

COUNTY OF ....., ss.

..... of ....., Michigan, being duly sworn, says that ....., plaintiff (*or* a defendant) herein, departed this life on the ..... day of ....., 19...., and that no proceedings have been taken in said cause on the part of said plaintiff (*or* defendant) since said date; that this deponent has been appointed administrator of the estate of said ..... deceased, being so appointed by an order of the Probate Court of said county on the ..... day of ...., 19.... (*if deponent is executor, vary to fit facts*); and that this deponent is advised that the cause of action in this suit survives to this deponent as such administrator (*or* executor) of said estate against the defendant (s) .....

.....

Subscribed and sworn to, etc.

No. 38. Order Suggesting Death of Lien Claimant.

(*Entitle Court and Cause and Caption.*)

In the above entitled cause, upon reading and filing the affidavit of ....., showing the death of ....., plaintiff (*or* a defendant) herein, and it appearing to the court that the cause of action survives in favor of said ....., administrator (*or* executor) of the estate of said ....., deceased, it is ORDERED that the death of said plaintiff (*or* defendant) ..... be, and the same is hereby suggested on the record of this cause; and that this cause proceed in favor of said .... as administrator (*or* executor) of the estate of said ....., deceased, against said defendant (s) .....

.....

Circuit Judge.

No. 39. Decree.

(*Entitle Court and Cause and Caption.*)

This cause came on to be heard upon the pleadings and proofs, and after the conclusion of proofs was argued by counsel for the respective parties, and the court upon due consideration thereof finds that the matters stated in the bill of complaint in this cause are true, that all of the notices, claims and prerequisites to a valid lien upon the premises mentioned in said bill have been fully given, filed and performed in accordance with the statute in such case made and provided, and that there is now due to the plaintiff the sum of $....., for which plaintiff is entitled to a lien on said premises, to-wit: ....., in accordance with said statute.

It is therefore ORDERED, ADJUDGED AND DECREED that said plaintiff have a lien on the said above described land and premises to the said amount of $..... so found to be due to him as aforesaid; and that the said defendant pay or cause to be paid to said plaintiff, or his attorney, the said sum of $....., with interest thereon from this date at the rate of five (5%) per cent. per annum and the costs of the said plaintiff by him or about this suit in his behalf expended to be taxed, on or before the ..... day of ...., 19...., and in default thereof, that all and singular the said premises, or so much thereof as may be sufficient to raise the amount as aforesaid decreed to be due to the plaintiff with the interest thereon and the costs in this case and the costs and expenses of sale and which may be sold separately without material injury to the parties interested, be sold at public auction by or under the direction of a Circuit Court Commissioner for the said county, at any time after the ..... day of ....., 19...., that the said sale be made in the county of .....; that the said Commissioner give public notice of the time and place of such sale according to the course and practice of this court and the

statute in such case made and provided, and that the plaintiff or any of the parties in this cause may become the purchaser or purchasers of said premises on the said sale; and that the said Commissioner out of the proceeds of said sale pay to the plaintiff, or to his attorney, costs in this suit to be taxed and also the amount so decreed to be due as aforesaid and the interest thereon at the rate of five (5%) per cent. per annum from the date of this decree, or so much thereof as the amount realized from the sale of the premises aforesaid will pay the same; and that the said Commissioner take receipt for the amount so paid and file the same with a report of such sale and of his doings thereon; and that he bring the surplus moneys arising from said sale if any there be, into this court without delay to abide the further order of this court.

And it is FURTHER ORDERED, ADJUDGED and DECREED, that on and after fifteen (15) months from the date of the filing of the bill of complaint in this cause, to-wit, on and after the ..... day of ....., 19...., the defendant and all persons claiming or to claim from or under him be forever barred and foreclosed of and from all equity of redemption and claim in and to the said premises so sold, and every part and parcel thereof which shall not, prior to that time, have been redeemed from such sale.

And it is FURTHER ORDERED that the purchaser or purchasers of said premises at such sale be let into possession of such portions thereof as shall not have been so redeemed; and that any of the parties to this cause who may be in possession of said premises or any part thereof, and any person who, since the commencement of this suit, has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers on production of the deed of the said Commissioner for such premises and a certified copy of the order confirming the report of such sale after such deed has become operative.

And it is FURTHER ORDERED that if the moneys

arising from said sale be insufficient to pay the amount as aforesaid decreed to be due to the plaintiff with the interest thereon and costs, and expenses of sale as aforesaid, that the said Commissioner specify the amount of such deficiency in his report of said sale, and the said defendant, who is hereby decreed to be personally liable for the debt secured by the said lien, pay to the plaintiff the amount of such deficiency with interest thereon from the date of such report.

.....
Circuit Judge.

No. 40. Claim of Appeal.

(*Entitle Court and Cause.*)

Now comes the above named defendant, C. D., (*or* plaintiff .....) and hereby claims the benefit of an appeal to the Supreme Court of this State from the Decree (*or* final order, *etc.*) made and rendered in this cause by the above entitled court on the ..... day of..... ....., 19.....

Dated ..... day of ....., 19....

.....
Attorney for.....

No. 41. Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, ... of the ..... in the County of ....., and State of Michigan as principal, and ..... of ....., as surety, are held and firmly bound unto ..... of ..... in the sum of $....., lawful money of the United States of America, to be paid to the said ..... or to his certain attorneys, heirs, executors, administrators and assigns (*if bond running to corporation insert instead:* to its certain attorneys, successors and assigns), to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators (*or* successors), and

each and every of them, jointly and severally, firmly by these presents.

SEALED with our seals and dated this ..... day of ....., 19.....

WHEREAS the above bounden ..... has appealed to the Supreme Court of the State of Michigan from the decree (*or* final order, *etc.*) of the Circuit Court for the County of ..... In Chancery, made on the .....day of ....., 19...., in a certain cause in said court wherein the said ..... (*or* above bounden .....) is plaintiff and the above bounden ..... (*or* said .....) is defendant:

NOW, THEREFORE, the condition of this obligation is such that if the above bounden ..... shall diligently prosecute his said appeal, and shall perform and satisfy such decree or order as the said Supreme Court shall make in said cause, and shall pay all costs of the said ..... therein as the said Supreme Court shall award, then this obligation to be void, otherwise to remain in force.

.....(L. S.)
.....(L. S.)

(*Add justification for surety, if wished.*)

No. 42. Stipulation of Counsel as to Agreed Facts, upon Appeal.

(*Entitle Court and Cause.*)

It is hereby stipulated by and between the above .... and ....., by their respective attorneys, that, for the purpose of appealing the above entitled cause to the Supreme Court, for a determination of the rights of the respective parties herein, the following is a full statement of all material facts of the matter at issue:

.....

Dated at ....., Michigan, this ..... day of ....., 19.....

.....

Attorney for Plaintiff.

.....

Attorney for Defendant.

No. 43. Settlement of Case—Certificate of Circuit Judge.

(*Entitle Court and Cause.*)

I, ..., Circuit Judge of the Circuit Court of said County, in Chancery, before whom the above entitled cause was heard, do hereby certify that the foregoing case contains the substance of all the material evidence taken at the hearing of the above cause, and a statement of the facts agreed to by opposing counsel, and I do hereby make and settle the same accordingly; (*if part of testimony set up by question and answer add:* and I further certify that where the testimony in said cause is stated in the form of questions and answers, it is in my judgment necessary that said testimony should be so stated, in order that it and the questions raised in said cause may be clearly and fully understood).

Dated at ....., Michigan, this ..... day of ....., 19.....

.....

Circuit Judge.

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Ex. C. M.
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